

No. 16357

VOL. 3106

United States
Court of Appeals
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant.

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Appellee.

Transcript of Record

In Two Volumes

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Volume II

(Pages 247 to 507)

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Appeal from the United States District Court
for the District of Oregon.

(Testimony of Marvin T. Warlick.)

Q. (By Mr. Dezendorf): Mr. Warlick, do you recall giving a statement concerning your intention with regard to how long it would take to remove the timber from your property and what Mr. Davidson told you about it to Mr. Hoffman in his office in October of 1956?

A. I don't remember any of the details, sir. I remember talking with Louie about it.

Q. You don't recall writing out in your own handwriting a statement concerning this matter which Mr. Hoffman then had typed up from your notes and you signed?

A. Well, as I say, I remember signing something, but what was in it I don't remember.

Q. You don't remember writing it out in long-hand and his having it copied and then your signing it?

A. No; I would say that I don't remember.

Q. Do you remember at that time and place in Mr. Hoffman's office telling him that Mr. Davidson assured you that when the logging started it would not take long to finish the job and [197] would be completed in a matter of a few months, after which their rights and interests would cease?

A. I would have to review the statement, sir. As I say, I couldn't tell you what was in it now.

Q. And you don't recall that statement that I just indicated?

A. Well, if it's in it, it's substantially correct.

Q. And whatever you told him at that time was your then best recollection of the true situation, is that correct?

(Testimony of Marvin T. Warlick.)

A. I would think so, yes.

Mr. Dezendorf: May I have Exhibit 30, please?
May I open it to take out a different document?

The Court: Yes.

Mr. Dezendorf: Mark that as 30-A, please.

(At this point a typewritten document dated October 29th, 1956, signed by Marvin T. Warlick, was marked for Identification as Plaintiff's Exhibit 30-A.)

Mr. Dezendorf: Hand it to the witness.

(Whereupon the Crier did as requested.)

Q. (By Mr. Dezendorf): Mr. Warlick, will you read that, please? A. All right, sir.

(Whereupon the witness did as requested.)

Q. (By Mr. Dezendorf): Is that your signature on the document? A. It is, sir. [198]

Q. Is that the statement that you gave to Mr. Hoffman in his office on the date it bears?

A. It is, sir.

Q. And is it a true statement?

A. It is, sir.

Mr. Dezendorf: I will offer it in evidence.

The Court: All right. Admitted.

(At this point the document dated October 29, 1956, signed by Marvin T. Warlick, previously marked for Identification as Plaintiff's Exhibit 30-A, was thereupon received in evidence.)

Mr. Dezendorf: No further questions.

Mr. Biggs: May I have just a minute, your Honor?

The Court: Yes.

Mr. Biggs: No questions.

The Court: That's all.

(Witness excused.)

Mr. Biggs: Call Mr. A. S. Davidson.

The Court: Do either one of you want Mr. Warlick again?

Mr. Dezendorf: The only information is the cruise he was to produce.

Mr. Warlick: Yes, sir. If I have the papers they are up in my lumber office on 29 West 11th right here in town. [199]

The Court: Oh fine. That's just splendid. Mr. Warlick, would you please make a search of your papers as soon as possible? We are going to be at Fenton Hall on the University of Oregon campus. Do you know where that is?

Mr. Warlick: Yes, sir.

The Court: It's Room, I think 27.

Mr. Biggs: Isn't it on the main floor, your Honor?

The Court: It's right next to the library.

Mr. Warlick: I will find it.

The Court: Would you mind coming back this afternoon, in any event?

Mr. Warlick: I will make the search in ten or fifteen minutes and——

Mr. Biggs: You don't have to do it right now.

Mr. Warlick: All right. I will sit back here.

Mr. Biggs: Over the noon hour would give you enough time.

Mr. Warlick: Yes.

Mr. Biggs: Mr. Davidson, would you take the stand? [200]

ARTHUR SHERMAN DAVIDSON

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Mr. Davidson, where do you reside?

A. Mapleton.

Q. Mapleton, Oregon?

A. Mapleton, Oregon.

Q. How long have you lived at Mapleton, Oregon?

A. Since '42. My family moved there in '42. I was there in '39 off and on.

Q. What is your present occupation?

A. Well, I suppose you would call me a lumberman.

Q. You are semi-retired at the moment?

A. Just at the moment.

Q. What? A. At the moment.

The Court: I don't understand that. What does that mean?

Mr. Biggs: Well, the lumber industry isn't just what it should be, I think, is what he referred to.

(Testimony of Arthur Sherman Davidson.)

Q. Although you do have sons and others in your family who are actually engaged in the operation of your business? A. Yes. That's right. [201]

Q. Yes. You say a lumberman. What are your activities, precisely? What kind of lumber activities are you engaged in?

A. Well, sawmill. We have a sawmill.

Q. You own and operate a sawmill at Mapleton?

A. That's right.

Q. What is the name of that sawmill?

A. Davidson Industries, Inc.

Q. What kind of timber are you using in that sawmill, all species?

A. No, not all, but fir, Douglas Fir, Hemlock, Spruce and occasionally some cedar.

Q. How long have you owned and operated that mill, Mr. Davidson?

A. Well, going into the fourth year.

Q. When you say you came into the Mapleton area in '38 or '39, from what part of the country did you come? A. Puget Sound.

Q. How long had you lived in the Puget Sound area? A. Oh, fifty-one or -two years.

Q. That is your native state, is it, Washington?

A. I was born in South Dakota.

Q. Yes. But most of your adult life was spent in Washington prior to coming to Oregon?

A. That's right. [202]

Q. What business were you engaged in up there? A. Logging.

Q. By logging do you mean that you were buy-

(Testimony of Arthur Sherman Davidson.)

ing tracts of timber which you were logging out or you were engaged on contract to cut timber from other people's lands?

A. No. We bought our own timber and logged it.

Q. Yes. And what kind of timber were you dealing with? A. Mostly fir.

Q. Yes. What grades of fir, types of fir, species?

A. All types.

Q. Old-growth, second-growth fir?

A. That's right. What they call red fir and yellow fir.

Q. Those colors that have been referred to in connection with describing timber; old-growth, generally, is referred to as yellow fir, and second-growth, red fir, or is that too simple a classification?

A. I would hate to get into an argument about that.

Q. All right. Most of your life, then, you have spent in the fir industry, is that correct?

A. That's right.

The Court: Do you want to qualify him as an expert?

Mr. Biggs: Yes, your Honor.

The Court: You have admitted he is an expert. Or he should be after these years.

Q. (By Mr. Biggs): Now, did you have a specific purpose in [203] mind in coming to Oregon?

A. Oh, yes.

Q. What? In connection with the logging business, I mean, or the lumbering business?

A. To obtain timber, of course. Timber in Wash-

(Testimony of Arthur Sherman Davidson.)

ington that was obtainable was getting really scarce. We came down here because it was more plentiful here and easier to get hold of.

Q. When you left Washington what type of—were you operating a sawmill up there at that time? A. No.

Q. Just logging? Logging and selling logs?

A. Logs and piling.

Q. And piling. Now, what kind of timber with respect to old-growth or second-growth fir were you dealing in up there?

A. Both. Both fir, old-growth and second-growth. For the piling, mostly second-growth.

Q. What is piling? What do you mean by piling?

A. That's the tree that they cut down and trim, generally peel—not all—and use to drive under a dock or a bridge. For instance, one order that we filled we sent out two shiploads to go to the Oakland Bay Bridge in San Francisco. We shipped lots of piles to Japan. At that time the Japanese market was good. We sent many a shipload to Japan.

Q. Can you keep your voice up a little bit? Perhaps if I may come a little closer, your Honor—just go ahead—I [204] didn't mean to interrupt you—with your statement.

A. I was all through.

The Court: I think he finished his answer on the piling.

Mr. Biggs: I see.

Q. Was that a substantial part of your busi-

(Testimony of Arthur Sherman Davidson.)

ness in Washington, the manufacture or the production of second-growth logs?

A. A substantial part?

Q. Yes, sir.

A. Yes, sir; at least 50 per cent.

Q. And the poles, you say, were all second-growth, is that correct?

A. Not all, but mostly.

Q. Mostly?

A. There were some type of piling for which they required second-growth.

Q. Yes. A. And——

Q. What other products were—manufactured products at that time were being marketed in that area or abroad or in California, or served by that section of the country with second-growth timber or from second-growth timber?

A. Oh, at that time, of course, second-growth was manufactured into lumber just the same as anything else, as far as that goes. Perhaps a little lower price than the old-growth, but still it [205] was used all the time for lumber.

Q. Was there any considerable demand for ties, bridge decking, and so on?

A. Ties—lots of ties.

Q. Those are just ordinary ties that the railroads use? A. That's right.

Q. Yes. What were they manufactured out of, principally, Mr. Davidson?

A. Well, two types of ties. The sawmill, if they cut a tie, they will cut it out of either old-growth

(Testimony of Arthur Sherman Davidson.)

or second-growth. Generally it's a poorer grade of log. We also sold hewed ties.

The Court: What kind?

The Witness: Hewed ties.

The Court: Hewed ties?

The Witness: Yes. Men would go into the woods with a broad ax and smooth off two faces of log, take a small tree, hew it off on each side with a broad ax and saw it into eight-foot lengths and sell it for ties.

Q. (By Mr. Biggs): And how large a tree would it take to produce that kind of a tie?

A. The average tie had to be eight inches through.

Q. At what point, top or stump or breast-high or——

A. I mean the tie itself had to be eight inches through.

Q. Oh. The tie had to be eight inches [206] through?

A. And it would also have to have either six or an eight-inch face so that it would take a tree large enough to flatten off six inches on each side. It would be eight inches through.

Q. How long would the tie have to be?

A. Eight feet.

Q. Eight——

A. Eight feet is the shortest.

Q. So that when we are speaking of Douglas Fir it was a relatively small tree could produce ties, is that correct? A. Right.

(Testimony of Arthur Sherman Davidson.)

Q. Yes, sir. Now, when you came into Oregon in 1938 or '9 will you state what your activities were with respect to acquiring timber? A. What?

Q. What timber did you acquire, if any, when you came into Oregon in 1938 to '39?

A. Well, we bought a tract——

Q. Pardon?

A. We bought a tract at Mapleton.

The Court: I don't know who "we" is.

Mr. Biggs: Yes.

Q. I said yourself; if you were not acting alone——

A. Well, at the time I came I represented Davidson Brothers Logging Company, which was just myself and my brother. I purchased in our name a tract of timber that was cruised at [207] 203,000,000 feet.

Q. 203,000,000 feet?

A. Yes. 203,000,000 feet bought from McKenzie River Timber Company in the name of Davidson Brothers Logging Company. Immediately afterwards we went in with some other gentlemen and incorporated as the Siuslaw Forest Products.

Q. Now, will you identify the other gentlemen?

A. There was myself and my brother.

Q. Yes, sir.

A. Two gentlemen who operated on Puget Sound by the name of McKee and Lewis, Joe Lewis and Paul McKee. There was four people from Northwest Door Company, a man by the name of

(Testimony of Arthur Sherman Davidson.)

Herman Tensil, who is President of the Northwest Door Company. I can't think of——

Q. Gonyea?

A. Henry Gonyea and Ed Eisenhower. But I can't think of the fourth man.

Q. Well, that's sufficient. They were mostly, with the exception of you and your brother, residents of Washington, is that correct?

A. That's right.

Q. All right. You acquired, then, this one tract of timber and then when you say "we" you are speaking of the Siuslaw Forest Products——

A. Yes. [208]

Q. ——subsequently acquired other tracts?

A. That's right.

Q. Now, by 1942 what timber did Davidson Logging Company or Siuslaw Forest Products own in the Mapleton area? A. Well——

Q. Not tract by tract, but generally what areas? How extensive were those?

A. We owned this 203,000,000——

Q. Yes.

A. ——that we had purchased. And it's so far back I can't keep in mind the exact dates that we purchased the others and which tracts we purchased first. But altogether in there I think up to the time we probably had 240,000,000.

Q. Do you know where the Warlick tract of timber was located, Mr.—— A. Oh, yes.

Q. ——Yes. Now, by 1942 had your other holdings extended to the Seaver tract? A. Yes.

(Testimony of Arthur Sherman Davidson.)

Q. Were you actually logging in those other holdings? A. Yes.

Q. How far would they be from the Seaver tract?

A. The holdings or the logging?

Q. Yes. What you were logging.

A. Oh, I think probably we were within four miles of their [209] line.

Mr. Biggs: Yes.

The Court: Just one second. I notice Mr. Husband is talking to Mr. Warlick. And it's perfectly all right to talk to him about this other——

Mr. Biggs: The cruise?

The Court: The cruise. But I don't know whether you propose to interrogate Mr. Warlick concerning that other contract or not. If so——

Mr. Dezendorf: I do not.

The Court: Well, then, you can talk to him about anything you want. If you were going to, I was going to ask him not to talk to him. All right.

Mr. Husband: I was just going to make—tell him that we had inquired from Mr. Hooker about the cruise. I thought maybe he might——

The Court: You can talk about anything you want now.

Mr. Husband: But Mr. Hooker couldn't find the cruise either.

Mr. Biggs: Mr. Warlick says he thinks now that he has it.

Mr. Husband: I was telling him that he couldn't get it from Hooker.

Q. (By Mr. Biggs): Had your holdings ex-

(Testimony of Arthur Sherman Davidson.)

tended to the Warlick tract by 1942, Mr. [210] Davidson?

A. Yes. The original piece that was bought during the Warlick's tract.

Q. And you say your logging show at that time was about four miles airline from the Warlick tract?

A. I think right towards that. We were within four miles.

Q. Yes. And you mean by that that you had a logging road that would have to be extended about four miles to reach the Seaver tract; is that correct? A. Yes.

Q. Did you then have in operation a mill, Mr. Davidson?

A. If it was not in operation, it was nearly so. I couldn't place the exact date that we started to operate. It will be brought out here.

Q. Were you doing any second-growth logging at that time? A. Yes.

Q. Yes. Were you manufacturing the second-growth or were you selling the logs?

The Court: Is that in Oregon?

Mr. Biggs: Yes, your Honor. This is Mapleton that he is talking about.

The Court: You were cutting second-growth in what year?

Mr. Biggs: At the time.

Q. '42?

A. We had cut it in '41 already then.

Mr. Biggs: '41. The question, your Honor, was what he [211] was doing at the time.

(Testimony of Arthur Sherman Davidson.)

The Court: I think that that is going to be very difficult to hear. Why don't we recess now and we might have better——

Mr. Biggs: Acoustics.

The Court: Yes. All right. Now, let me see if we have everything that is here. Will all those persons who are under subpoena or who are here at Mr. Biggs' request or Mr. Dezendorf's request please go to Fenton Hall, Room 27, I believe it would be, and be there a little before 1:30? We are going to take up sharply at that time. All right. We will recess until 1:30 to Fenton Hall.

(At this point the Court adjourned for the noon recess at 11:55 a.m.) [212]

Afternoon Session

(At this point the Court reconvened at 1:30 p.m. pursuant to the noon recess, and further proceedings herein were had as follows:)

Mr. Biggs: I would like to recall Mr. Warlick for a question or two, your Honor, at this time.

MARVIN T. WARLICK

was thereupon recalled as a witness in behalf of the Defendant, and, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Biggs:

Q. Mr. Warlick, in the course of your testimony this morning you stated that you thought that you had a copy of the Hooker cruise or some cruise that you had had made of this timber prior to its actual sale in 1942, and you said you thought you had it among your papers here in Eugene and you would make a search for it over the noon hour. Have you made such a search and failed to find anything on the case? Do you know where else it might be among your effects, if you still have it?

A. I am sure I do not have it because if I did have it it [213] would be in that particular drawer.

Mr. Biggs: You may cross-examine.

Cross-Examination

By Mr. Dezendorf:

Q. Did you try to call Mr. Hooker to find out if he had a copy? A. No.

Mr. Dezendorf: That's all.

The Court: All right. Well, then, Defendant's Motion to strike the testimony of Mr. Warlick with reference to the cruise is denied and the evidence is now admitted.

Mr. Biggs: Fine. You may step aside, Mr. Warlick.

(Witness excused.)

Mr. Biggs: Mr. Davidson, resume the stand.

The Court: You have a quizzical look. Do you want to take an exception?

Mr. Dezendorf: I don't need one.

Mr. Biggs: I was going to say this: That if Mr. Dezendorf implies by his question that he is not satisfied with the search I can put a witness who has investigated the matter with Mr. Hooker and who was unable to locate the cruise——

Now, if you are going to make any subsequent point of it, I would rather make that showing in the record at this [214] time.

Mr. Dezendorf: I was searching my mind because, as I view it, the mere fact that this particular witness, Mr. Warlick, does not have a copy of the cruise should not be sufficient evidence to let in secondary evidence unless there is a further showing that the original, which is the best evidence, or copy of it, or something, is not available.

The Court: I thought that wasn't necessary in view of the fact that Mr. Husband stated this morning that he had called Mr. Hooker and had attempted to get the cruise and Mr. Hooker had informed him that no such cruise was available. What is your name?

Mr. Biggs: Biggs is my name at the moment, your Honor.

The Court: Mr. Biggs had made an identical

statement. I thought the record was sufficient on that point. But if you want any sworn testimony——

Mr. Biggs: Let's put Mr. Husband on. It will take only a minute. You can cross-examine him if you desire.

Mr. Dezendorf: Very well.

Mr. Biggs: Please step aside and let Mr. Husband take the stand. [215]

DONALD R. HUSBAND

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. You are an attorney-at-law, are you not?

A. I am.

Q. Admitted to practice at the Bar of this State, is that correct? A. (Witness nods head.)

Q. You are associated as one of the attorneys for the defendant in this action, are you, Mr. Husband? A. I am.

Q. Have you been representing the defendant in association with us during the pendency of the suit? A. I have.

Q. During the course of your preparation and investigation of the facts of this case, Mr. Husband, state whether or not you made an attempt to locate a cruise of the tract in dispute here which we

(Testimony of Donald R. Husband.)

have referred to as the Seaver tract prior to its sale in 1942.

A. I have. I think it was in December of 1957 when we first discovered from talking to Mr. Davidson that Mr. Hooker was the one that had performed the cruise. I think when I had talked to Mr. Davidson previously he couldn't remember who had [216] done that or whether a cruise had been made. Finally, when we were down in Mapleton, I think, about in December of 1957 he recollected that it was Mr. Hooker that had made this cruise.

Q. Had you first made any effort to locate such a cruise in the files of the company, Mr. Husband?

A. We have, and we asked Mr. Davidson if he knew of a cruise.

Q. Yes.

A. And he said he did not know where it could be found, but finally he suggested that we get ahold of Mr. Hooker.

Q. Did you do that?

A. I did. Mr. Hooker is an elderly man about 70 years of age or better, lives out—and I got him in the office and asked him about it and I think I have got a card or a letter here from him stating that he could not find it. He would go home and look. He thought he might have it. But let me—may I take a moment to look through my—

The Court: Well, I don't think you have to have the letter. Your testimony is sufficient.

Mr. Biggs: I don't think so.

(Testimony of Donald R. Husband.)

Q. You, in fact, reported that immediately?

A. I did, your Honor.

Mr. Biggs: Thank you, Mr. Husband. That's all.

The Witness: Well, anyway, he reported that there were [217] certain cruise books that he could not find and I can't remember—recollect the numbers, but he had the numbers and they ran consecutively from about, I think, 7 or 8 up to about 16. And he said, "I can't find them anywhere."

Mr. Biggs: You may cross-examine.

Cross-Examination

By Mr. Dezendorf:

Q. So that you have known about Hooker cruise since September of 1957, is that right?

A. I think that's when we first found out that that was the man that made the cruise, yes.

Q. Have you ever found that Lozo & Frost cruise that was made in 1944?

A. Mr. Dezendorf, I have never known of that.

The Court: You never knew of such a cruise?

Mr. Biggs: It was handed to Mr. Dezendorf yesterday and rejected and it has nothing to do with this property. And Mr. Hoffman was so notified when depositions were exchanged at Mapleton some months ago.

Mr. Dezendorf: Well, now, Mr. Biggs—

Mr. Biggs: The cruise was brought into the courtroom at Mr. Dezendorf's request and shown to him yesterday. And I asked him if he wanted

(Testimony of Donald R. Husband.)

to have it marked as an exhibit, and he [218] said, "No."

Mr. Dezendorf: The cruise I asked for, Mr. Biggs, was Lozo & Frost cruise relating to this property and you did not produce any such cruise.

Mr. Biggs: We have no such cruise.

The Court: Any further questions?

Mr. Dezendorf: No further questions.

Mr. Biggs: I will ask him one other question, then, if Mr. Dezendorf wants to pursue that further.

Redirect Examination

By Mr. Biggs:

Q. Have we produced to your knowledge—and I want you to answer this based upon a showing as to the investigation you have made—all of the cruises pertaining to this property that we have or that the company's files reveal or that anyone else has that anyone has told you they might have?

A. We have.

Q. All right. And have they revealed any other cruises than those we have produced?

A. Could I have that again?

Q. Has that search located any other cruises than those that have been here produced?

A. It has not.

Mr. Biggs: You may cross-examine.

Mr. Dezendorf: No questions. [219]

The Court: That's all.

(Witness excused.)

The Court: Mr. Davidson, please resume the stand.

Mr. Biggs: Your Honor, I think it might be helpful now if we could at this point in Mr. Davidson's testimony make use of our Exhibit 53.

The Court: Ask him the questions and let the Crier put that up. [220]

ARTHUR SHERMAN DAVIDSON

thereupon resumed the stand as a witness in behalf of the Defendant and, having been previously sworn, was examined and testified as follows:

Direct Examination

(Continued)

By Mr. Biggs:

Q. At the recess, Mr. Davidson, you were telling us about the development of a logging road into the Seaver tract or the area immediately contiguous to that, as I recall, and I think your testimony was that in 1942 at the time you bought the Seaver tract the roads had extended to within about four miles as the crow flies of the Seaver tract, is that correct? A. Roughly that, I think.

Q. Pardon? A. Around four miles.

Mr. Biggs: Yes.

The Court: What year was that?

The Witness: '42; at the time of this contract.

The Court: When was the Siuslaw Forest Products Company organized?

The Witness: '40 or '41. I think '40, probably.

The Court: When was the mill completed?

(Testimony of Arthur Sherman Davidson.)

The Witness: Oh, as near as I can remember, we started cutting in the fall of '42.

The Court: And, therefore, you had purchased the timber off the Seaver tract prior to the time that the mill got in [221] operation?

The Witness: Yes; I think a few months before.

Mr. Biggs: There may be a little dispute of testimony about that. I think some of the witnesses recollect that the mill actually was in operation, your Honor. But it was about that time.

Q. Now, Mr. Davidson, I am going to direct your attention to the map on the board which is identified as Exhibit 53.

The Court: Mr. Husband, would you mind moving a little?

Mr. Biggs: Can we move this down here a little bit?

The Court: All right. Go ahead.

Mr. Biggs: May I come around counsel table?

The Court: Yes. Surely.

Q. (By Mr. Biggs): Can you recognize from the map the Seaver tract on there, Mr. Davidson?

A. I imagine it's the red.

Q. It is the red? A. Yes.

Q. The legend shows that the green are the various tracts that you acquired from '39 to '47. The Seaver tract is shown in red (indicating). The pink line indicates road construction prior to or by 1942 and the black line shows the construction of the road by stages from '46 to 1950. Does that

(Testimony of Arthur Sherman Davidson.)

refresh your recollection of the situation in 1942, then, the extent of the— [222] —of the——

A. Yes, I think so.

Q. ——red line? A. Yes.

Q. Yes. Where were you actually doing your logging, then, in 1942, spring of '42, when you bought the Seaver tract?

A. Well, somewhere in the upper mile of that red line.

Q. It would be in the uncolored area up here some place? A. No. No.

Q. Down in here (indicating)?

A. I should have said the lower mile of the red line.

Q. The what?

The Court: Will you step down and designate it?

Mr. Biggs: Yes. Perhaps you can.

The Witness: We were logging somewhere in this area at that time (indicating). Our first logging operation started here (indicating). And by '42 we were down in here (indicating).

The Court: Will you show——

Q. (By Mr. Biggs): Probably somewhere in here (indicating) that you were in, Section 24? Some place in Section 24, is that right?

A. That's right.

Q. Is that correct?

A. And over—could possibly have been as far as 19——

Q. Yes. What kind of timber were you then taking for your [223] mill?

(Testimony of Arthur Sherman Davidson.)

A. Douglas fir, hemlock, cedar. No spruce in that area.

Q. All grades of Douglas fir; that is, old-growth, second-growth, and what not that you came to?

A. That's right.

Q. Yes. When you first talked with Mr. Warlick about the purchase of the Seaver property——

The Court: One minute. Don't answer that question.

Mr. Dezendorf: It may perhaps be a little preliminary, but I don't want to take any chances on it. I think the Court is aware of our position with respect to what the intention or conversation of the parties——

Mr. Biggs: My questioning now will be directed to negotiations and consummation of sales.

The Court: Make your record.

Mr. Dezendorf: I was finishing my sentence.

The Court: All right. Go ahead.

Mr. Dezendorf: Therefore, we make the same objection at this time that we did to the testimony of Mr. Warlick on the same subject. If your Honor wishes me to go into detail, I will.

The Court: All right. Just for one minute for the benefit of our friends.

Mr. Dezendorf: It is the position of the plaintiff as disclosed by the contentions in the pretrial order the word [224] "merchantable" as used in the contract of sale involved is not ambiguous; it is a word of known meaning and, therefore, the testimony of the individuals who entered into the

(Testimony of Arthur Sherman Davidson.)

contract with respect to what they may have intended when they used the word merchantable is not properly admissible. And, also, that any oral testimony to attempt to explain or vary the terms of the contract would be improper.

The Court: Objection is overruled. You may have an exception to this whole line of interrogation.

Q. (By Mr. Biggs): Now, if you will proceed, Mr. Davidson. Do you recall the question? When did you start your negotiations with Mr. Warlick or your first discussions with Mr. Warlick about the purchase of this property which we know in this case as the Seaver tract?

A. I couldn't tell you the number of months to the exact day. I imagine it was about the first time I met Marvin, because he wanted to sell that timber to me in 1940.

Q. Some time, you think, around 1940 is when you had your first discussion with him?

A. I am sure of that.

Q. So that the Court will know precisely what your situation was at that time, I would like you to tell us just what your plans and the plans of your crew were with respect to planning your operation in the Mapleton area at that time.

A. The corporation had just been formed. Our actual plan of [225] operation wasn't too far advanced except to the extent we had bought a sawmill up in the State of Washington and were in the process of moving it down there to erect at Mapleton and operate it as a sawmill and manu-

(Testimony of Arthur Sherman Davidson.)

facture lumber out of this timber which we had bought.

Now, just—see, we had already started a road-building up Hatchet Creek and, possibly, but the time that I first talked to Mr. Warlick I may have done a little logging by that time.

Q. Were you then particularly anxious to get the Seaver tract, Mr. Davidson? And when I say “you” I am speaking of you and your associates.

A. Well, as a corporation, frankly, the Board of Directors felt that we had purchased about all of the timber that we were in a position to purchase at that time.

Q. Yes. What was Mr. Warlick’s desire, to sell; or what were his express reasons for his desire to sell?

A. I am not sure that Marvin ever told me.

Q. Who was the aggressor in these negotiations?

A. Marvin Warlick.

Q. Was he representing himself as being somewhat urgent or anxious to sell?

A. Well, he was rather persistent in his efforts to interest me in the timber.

Q. Were there a series of conversations and conferences about [226] it? A. Oh, yes.

Q. A number of them, I mean?

A. Oh, yes.

Q. Where were they held?

A. At various places, I would say, wherever I would run into Marvin or he’d run into me.

(Testimony of Arthur Sherman Davidson.)

Q. Were some of them at your plant in Mapleton?

A. Yes; down at the office. Perhaps some at his cabin.

Q. What were the early discussions about prices of timber, Mr. Davidson?

A. Well, he was inclined to ask what I felt it was worth.

Q. Did you ever make a direct offer prior to the time that you settled on the price of \$7,000?

A. I wouldn't remember if I had definitely or not.

Q. Yes. Had he ever made demands for more than \$7,000? A. Oh, yes.

Q. What was he thinking about in the beginning?

A. Well, if I remember rightly, I think he talked \$10,000 to start with.

Q. Then was the price of \$7,000 that was ultimately agreed upon related by agreement to a unit price for the timber, so much a thousand for timber, or was it a straight negotiated lump-sum price of \$7,000?

A. Lump-sum price, unquestionably. [227]

Q. You stated that the cruise had been made, or did I ask you that question? Had you had a cruise made of the timber at that time?

A. At the time of the contract?

Q. At the time of the contract. A. Yes.

Q. Yes. Do you know about when that cruise was made, Mr. Davidson?

(Testimony of Arthur Sherman Davidson.)

A. No. But, not too long before the time of the contract.

Q. It was made with the purchase in mind, was it? A. Oh, yes.

Q. With a possible purchase in mind?

A. Oh, yes. Sure.

The Court: What is the name of that cruise; is that the Hooker cruise?

The Witness: That's right.

The Court: I thought the Hooker cruise was paid for by Mr. Warlick.

Q. (By Mr. Biggs): Do you remember who had the cruise made?

A. I couldn't swear who paid for it, but I can swear that I hired Mr. Hooker to do the cruising.

Q. All right. Do you have a copy of the cruise?

A. No.

Q. Do you remember what the cruise reflected in terms of thousands of board feet of various species on the property? [228]

Mr. Dezendorf: I will have to object to this. There is a positive dispute in the testimony as to what cruise we are talking about, I think, and I am not so sure that Mr. Davidson's memory may not be wrong as to his having the Hooker cruise.

My memory is that Warlick definitely testified that he retained Mr. Hooker to make the cruise for him. And I would object at this time.

The Court: Well, on what ground do you object?

Mr. Dezendorf: Two grounds: Secondary evidence——

(Testimony of Arthur Sherman Davidson.)

The Court: Well, I am ruling against you on the secondary evidence because I think the testimony is clear that they attempted to get the original document and the document is not available.

Mr. Dezendorf: And I think under this testimony—this gentleman's testimony is mistaken as to him having——

The Court: A lot of witnesses are mistaken, but that's no basis for excluding the testimony.

Q. (By Mr. Biggs): Do you have a present recollection about what it was? We are not expecting you to testify precisely, but in what range?

A. In the range of five million feet.

Q. Five million feet? A. Yes.

Q. Could be more or less than that?

A. Could be more or less. [229]

Q. Yes. Was there any discussion about the second growth at that time, Mr. Davidson?

A. If there was, I don't remember.

Q. Was there anything said about your taking the second growth; that Mr. Warlick wanted you to take second growth?

Mr. Dezendorf: That's leading and suggestive. The gentleman has said he doesn't remember. This is his witness. I would object.

The Court: All right.

Mr. Biggs: All right.

The Court: Go ahead and answer the question.

The Witness: If there was anything said, I just do not remember. That's the truth.

(Testimony of Arthur Sherman Davidson.)

Mr. Biggs: That's all right. That's exactly what we want, is the truth, whatever it is.

The Witness: Yes.

Q. (By Mr. Biggs): Now, what was said about the amounts of timber that you were buying on the place with respect to it being all or some or certain grades or species?

Mr. Dezendorf: I would object again to that as leading and suggestive. It's a vital point in the case and it's his witness.

Mr. Biggs: That isn't a leading question. I asked him what was said with respect to those things.

The Court: Well, there isn't too much specificity in the [230] question, but I am going to overrule the objection because the witness has indicated he is going to answer what he regards to be the facts anyway.

Mr. Biggs: Yes.

The Witness: I hope I understand the question. Are you asking me if I was to get all of the timber or——

Mr. Biggs: Well, I asked you—yes. That was the purport of the question. Were you or were you not?

A. I was.

Q. Were there any species of timber reserved at all, or kinds of timber reserved from that contract by your understanding with Mr. Warlick?

A. Well, cedar.

Q. Was there any cedar on there?

A. A few trees. There is some cedar stumps there.

(Testimony of Arthur Sherman Davidson.)

Q. Did you know that then? A. Oh, yes.

Q. You knew there was cedar on there?

A. Sure.

Q. How did you know that?

A. You could see them.

Q. Oh. You had seen them? A. Yes.

Q. Then what was said about the time for the removal of the timber? [231]

A. Well, we knew that it would be a long time before we would be built up to there and I requested plenty of time to take it off. And Mr. Warlick was quite agreeable to giving me plenty of time because, I believe, he stated before he was anxious to have the property left in its original shape, condition.

So it was agreed that we should have twenty-five years to take it off.

Q. Were there any immediate plans? Did you then have immediate plans for the operation of that tract?

A. Oh, no, not—might I explain? To us the minute that we bought that tract it wasn't a separate tract; it was a portion of the tract we already had and it would be logged at the natural operation—as the natural operation led to it.

Q. Is that the way it was logged, or were you connected with the company when the logging actually started there, Mr. Davidson?

A. No. I had already been separated from the——

Q. When did you separate from the company?

(Testimony of Arthur Sherman Davidson.)

A. '45.

Q. 1945? A. '45.

Q. Was that about the time U. S. Plywood acquired an interest in the company?

A. That was the time, yes; within a few [232] months.

Q. Now, among your associates you mentioned a Mr. Lewis from Washington. What was Mr. Lewis' principal business?

A. McKee & Lewis. They operated—

Q. Yes.

A. —as a partnership up there, or—they were the main exporters of timber products to Japan and China.

Q. Poles and pilings?

A. Poles and pilings, and even some logs.

Q. Was there any interest or general plan on the part of this group that formed Siuslaw Logging Company to develop that entity in Oregon for overseas market?

A. It was very definitely our idea to do so.

Q. Yes. Where were the markets other than Japan and overseas markets? Were there markets here in the Pacific Coast area?

A. Oh, yes; San Francisco, Los Angeles.

Q. I believe you testified this morning—we may have overlapped a little bit—

The Court: For what?

The Witness: Pilings.

The Court: You have mentioned poles for the

(Testimony of Arthur Sherman Davidson.)

first time. Do they use fir poles, or do they use mainly cedar poles?

The Witness: Oh, at the present time they use fir poles mainly. In years past they used to use lots of cedar poles, but, oh, from the time we are talking about on or even before [233] they used fir poles.

The Court: What kind of trees did they use for poles?

A. Well, the smaller fir on up. You know, poles are poles and there is a very great difference in the size of them. They use—about the smallest, oh, that the ordinary market takes is a 25-foot pole with 6-inch top.

The Court: So did you use second-growth or old-growth?

The Witness: We used second-growth because they treat the poles. You understand, they creosote them. Now, a second-growth tree is the only fir tree that they use for treating. They do not use an old-growth fir for treating because of the sap content of an old-growth; it doesn't absorb creosote.

The Court: Oh. Go ahead.

Mr. Biggs: I think you may cross-examine. Just one other question.

Q. Mr. Gonyea was mentioned as one of your associates. That's Mr. Henry Gonyea of Washington?

A. That's right. Mr. Henry Gonyea.

Q. Yes. Was he or his son directly or actively connected with the operation, the Siuslaw Forest Products Company, in this area?

(Testimony of Arthur Sherman Davidson.)

A. Yes. Both he and his son. His son was my assistant at Mapleton all of the time that I was with Siuslaw Forest Products.

Q. Will Gonyea? [234] A. Will Gonyea.

Q. What were his duties, generally, Mr. Davidson?

A. Well, he handled our sales, our office, and did most of the work.

Q. Was he around the office? Was he around the office a good deal of the time? A. Yes.

Q. Actually, shortly after '42 or '3 you retired briefly from the business, didn't you, on account of an accident or something for a year or several months? A. Well, yes.

Q. And—— A. For a period of time.

Q. And he took over, then, the active operation for awhile? A. Yes.

Q. Was he present, to your recollection, during any of your negotiations or conferences with Mr. Warlick, Mr. Davidson? A. Oh, I think so.

Mr. Biggs: Yes. You may cross-examine.

The Court: Just one second. Will Mr. Sanders and some of the other witnesses take places in the jury box and then other people can sit down there. All right, Mr. Dezendorf. [235]

Cross-Examination

By Mr. Dezendorf:

Q. You looked over the Seaver property yourself, did you not?

A. Yes; to a certain extent I did.

(Testimony of Arthur Sherman Davidson.)

Q. You didn't buy it with the idea of buying any poles or pilings? A. Yes, I did.

Q. Isn't it a fact, Mr. Davidson, that that is bought by lineal foot? A. No.

Q. At times?

A. It may be at times, but it is not at all times by any means.

Q. Did you hear Mr. Warlick testify this morning that you said you didn't want any of the second-growth? A. Yes, I heard him.

Q. And that was correct, wasn't it?

The Court: What did you say?

Q. (By Mr. Dezendorf): And that was correct, wasn't it?

A. Correct, as he testified to that, but not that I didn't want it.

Q. Did you tell him that you didn't want it?

A. If I did, I do not remember it. And that's the truth.

Q. You don't believe Mr. Warlick is lying about that, do you? [236]

The Court: Oh. I don't go for that stuff.

Q. (By Mr. Dezendorf): Do you recall whether you had the May 4th, 1942, contract drawn by a lawyer or not? A. I am sure that I did not.

Q. Who did; do you know?

A. No, I do not. But I would suppose it would be Mr. Henry Gonyea, who was General Manager of Siuslaw Forest Products. I was Resident Manager, and Henry Gonyea was General Manager who looked after those things.

(Testimony of Arthur Sherman Davidson.)

Q. You don't recall yourself talking to any lawyer about what your agreement was with Mr. Warlick, is that correct? A. No, I do not.

Q. How did you transmit the information to Mr. Gonyea as to what your agreement with Mr. Warlick was?

A. He was Chairman of the Board of Directors, and I was on the Board. And at a Directors' meeting, naturally all of those things were discussed.

Q. You don't think you made a written memorandum that would be available to Mr. Gonyea covering your negotiations with Mr. Warlick on this piece of timber? A. I doubt if I did.

Q. I take it that you don't know what lawyer, if any, drew that agreement?

A. No; I wouldn't know.

Q. Did you read the agreement over after it was drawn? [237] A. Oh, yes.

Q. Was it the agreement that you made with Mr. Warlick? A. Yes; sure it was.

Q. And you signed it? A. Certainly.

Q. You knew what merchantable timber was, didn't you? A. I think I do.

Q. Yet you say—or said on direct examination that you were to have all of the timber; is that correct?

A. That's right. I believe that's true. I still believe it.

Q. But there is no doubt in your mind that you read and understood the May 4th, 1942, contract before you signed it? A. That's right.

(Testimony of Arthur Sherman Davidson.)

(At this point Mr. Biggs' last question was read by the Court Reporter.)

Mr. Biggs: The question was "understood the contract." Was that in there, "read and understood"?

The Court: Read and understood the contract.

Mr. Biggs: Yes.

Q. (By Mr. Dezendorf): Mr. Davidson, isn't it possible that you are confused about having the right to take all the timber with a later transaction you had with Mr. Warlick concerning other timber?

A. Oh, I think not. [238]

Q. Did you have a later transaction with Mr. Warlick covering other timber? A. Yes.

Q. Did that talk about merchantable timber?

A. I couldn't tell you until I read it again.

Q. While you're pretty positive that you were to get all the timber in this first transaction, is it your statement you don't remember whether you were in the second one?

A. No. I am just as positive that I was to get all of the timber—may I talk just freely?

The Court: Go ahead.

The Witness: I was to get all of the timber that was of any use to me. Now, that's my understanding.

The Court: In what transaction?

The Witness: In both of them.

The Court: In the Warlick transaction and in the later one?

(Testimony of Arthur Sherman Davidson.)

The Witness: Yes. That's right.

Q. (By Mr. Dezendorf): Where was the piece that you bought from Mr. Warlick in the second transaction with him?

The Court: Do you want to step down to the map and locate it?

The Witness: It's a portion of the lower green there (indicating).

The Court: Do you know what it is—— [239]

The Witness: 19, 9.

Mr. Biggs: Would you want to point it out to him, Mr. Davidson? You can just step down and indicate it on the map.

The Witness: It's this one right down in through here and down in here (indicating). Now, that is all of this green area from this line on (indicating).

Mr. Biggs: Indicate the township, if you will, or the range.

The Witness: 19, 9 and 3, 4, 5 and 6—3, 4 and 5. It doesn't get into 6.

Mr. Biggs: For the record, your Honor, the witness is indicating the green areas south and east of it.

The Court: All right. You can resume the stand. Are you satisfied that is the property?

Mr. Dezendorf: I don't know this property.

The Court: Oh.

Q. (By Mr. Dezendorf): Mr. Davidson, did you have a contract drawn with Mr. Warlick covering

(Testimony of Arthur Sherman Davidson.)

the second transaction with him? A. Yes.

Q. You did it yourself that time, is that right?

A. No.

Q. You did not? A. No. [240]

Q. Do you know what lawyer drew the second contract?

A. Yes; I think I do. If I am not mistaken, it was Mr. Calkins.

Q. How does it happen that you know who drew that one and not the first one?

A. I bought that second tract myself, for my own personal self.

Q. I see. Do you remember whether the second contract gave you the right to cut anything that might become merchantable during the life of the contract?

A. I am inclined to think it did.

Q. What about the first one?

A. May I again talk?

The Court: Go ahead.

The Witness: Marvin and I unquestionably intended the same thing in the first contract that we did in the second. Possibly weren't careful enough in our wording.

Q. - (By Mr. Dezendorf): Mr. Davidson, you have been in this business for many, many years, haven't you? A. That's right.

Q. And you know what a contract means when it says merchantable timber and you know what a contract means when it says you buy all the timber, don't you?

Mr. Biggs: Your Honor, I object to that be-

(Testimony of Arthur Sherman Davidson.)
cause that's what this lawsuit is about. And I think you will find lawyers [241] and judges puzzled somewhat over just what that means.

The Court: Well, he hasn't been asked yet.

Mr. Biggs: It means what the parties intended it to mean.

The Court: You asked him if he knows what merchantable timber is and he said he thought he knew, but you haven't asked him what his definition is.

Mr. Biggs: That's right.

The Court: So I am going to ask him. What is your definition of merchantable timber?

Mr. Dezendorf: Well, if the Court please, does my objection go to this?

The Court: You can have an objection. I just want to know what his views are——

Mr. Dezendorf: Very well.

Mr. Biggs: I will adopt the question if the Court doesn't want to.

The Court: ——as applied to this—or in general, first, and then as applied to this particular transaction.

The Witness: You are speaking of standing timber?

The Court: Yes.

The Witness: My definition of a merchantable tree or merchantable timber would be timber from which one can obtain marketable products, wood products.

The Court: And was that your definition in response to [242] Mr. Dezendorf's statement?

(Testimony of Arthur Sherman Davidson.)

The Witness: Sure.

The Court: And would you say that your definition as applied to this particular tract was any different than your general idea?

The Witness: No. No.

The Court: All right. Go ahead.

Mr. Dezendorf: May I have Exhibit 30-A? I guess I mean -B. It's in the white envelope I opened by mistake this morning. Could I have that marked 30-B, please?

The Court: I don't think you can use it now, Mr. Dezendorf. We gave you the opportunity this morning and you rejected my offer. I said to you at that time "Do you want that exhibit marked and made available?" And you said, "No." And you stood on your rights to have it as a sealed exhibit. Now I am going to rule you can't use it.

Mr. Dezendorf: Well, may I make a statement with respect to that?

The Court: That's perfectly all right. But I gave you that opportunity. You know that there are no tricks in this court and you have got to show the exhibit to someone else. That exhibit should have been shown to them this morning.

Mr. Dezendorf: For the record may I say that your Honor's limitation on me was with respect to the questioning that I was then directing to Mr. Warlick, and your Honor gave me the [243] privilege of pursuing the testimony with Mr. Warlick on the line that I was going if I wished to show Mr.

(Testimony of Arthur Sherman Davidson.)

Warlick the exhibit—or at least that is the way I understood your Honor's ruling.

The Court: Mr. Dezendorf, you have been a member of this Court for a long, long time. I explained to you in detail in chambers when we took your statement outside the presence of Mr. Warlick that there are only two methods that you can use to use an exhibit: One, a sealed exhibit solely for purposes of impeachment and not as substantive evidence; the other one is that the exhibit must be marked and made available and exhibited to Counsel. At that time you elected—I asked you specifically, "Do you want this exhibit marked?" And you said, "No." So under the rules of this Court you may not use it.

Mr. Dezendorf: May I have it marked?

The Court: Yes. It is marked now.

The Clerk: It is marked now.

(At this point a three-page photostatic copy of a document entitled Contract and Agreement dated August 10, 1945, was marked for Identification as Plaintiff's Exhibit 30-B.)

Mr. Dezendorf: May I exhibit it to the witness?

The Court: Well, Mr. Dezendorf, I have just ruled that [244] you can't use it.

Mr. Dezendorf: Very well, your Honor.

The Court: It's a direct violation of my ruling this morning, except if you want to use it for impeachment, and up to now you haven't shown any grounds for impeachment of this witness.

(Testimony of Arthur Sherman Davidson.)

Mr. Dezendorf: May I ask that Mr. Warlick be asked to stay?

The Court: Yes. I have ordered him to stay this morning.

Mr. Dezendorf: Thank you, your Honor.

Q. Now, my understanding, Mr. Davidson, was that you said you didn't expect to reach the Seaver property with the road for quite some time: is that correct?

A. That's right. We wouldn't, naturally, be up there for a period of time.

Q. How much of the road which is shown on that map partially in red and partially in black, if any, was County road?

A. I believe the first half-mile.

Q. Of the red part?

Mr. Biggs: One-half mile?

Mr. Dezendorf: That's what he said.

The Witness: The first half-mile.

Q. (By Mr. Dezendorf): The Seaver place in 1942 was quite inaccessible, was it not?

A. Well, less so than it is today, of course. [245]

Q. There was no usable road into it in 1942, was there? A. Oh, yes.

Q. What kind of a road was there?

A. Well, not a good road, but a road that you could drive a car in there.

Q. But you had to go 20 miles on that road to Mapleton to get there, didn't you?

A. Possibly the—yeah: right close to 20 miles. That's right.

(Testimony of Arthur Sherman Davidson.)

Q. And that's very much longer than the present road, is it not?

A. Yes; about—I think that's 12 miles in there.

Q. Now, the last four miles of road into the Seaver property was over very steep terrain, was it not?

A. Pretty rough country.

Q. It was much rougher than a portion of the road that is shown in red, was it not?

A. Yes. The first portion, the red portion there, has always followed Hadsall Creek.

Q. Now, is it your memory, Mr. Davidson, that cedar timber was expressly excluded from the May 4th, 1942, contract?

A. Will you ask me again, please?

(At this point Mr. Dezendorf's last question to the witness was read by the Court Reporter.) [246]

The Witness: I doubt if it was expressly excluded. It just wasn't included in the contract.

Q. (By Mr. Dezendorf): And you knew that it wasn't included?

A. Oh, yes.

Q. Was there any occasion that you can think of now why the Seaver property and the adjoining property to the north was cruised by Lozo & Frost in 1944 and 1945? Was there any reason why that might have been done?

A. If it was cruised by Lozo & Frost, I did not know it. I had nothing to do with it.

Q. Well, perhaps you missed the point of my question.

A. Yes.

(Testimony of Arthur Sherman Davidson.)

Q. Was there any sale of Siuslaw Forest Products itself in prospect in 1944 or '45 which would have indicated the necessity for cruises?

A. That might be all right because we were negotiating with U. S. Plywood to take the interest from us.

Q. Was that as early as 1944 and 1945?

A. Yes. The sale was consummated in '45; that is, United States Plywood took an interest in Siuslaw Forest Products in '45.

Q. And, as a matter of—excuse me if you are not through.

A. Well, I was going to say in all probability they were already negotiating in '44.

Q. Isn't it a fact that in the course of those negotiations [247] that all of the timberland and timber rights that you had were cruised at that time?

A. No; I don't think they were.

Q. What ones were not cruised?

A. Oh, I think very little of them was cruised. I think very little of it was cruised. If I may speak again——

The Court: You go ahead.

The Witness: Ofttimes I buy a piece of timber and I never cruise it, but I will say to a cruiser, "Van, go in there and see if there is that much timber there." I know to buy that piece of timber I have to be justified to buy it. There has to be so much timber.

Now, a cruiser can go on a piece of timber oft-times and come near enough to knowing what is

(Testimony of Arthur Sherman Davidson.)

there without making an actual cruise of it. He can come back and tell me, "I am sure there is enough timber there to justify buying it."

Now, there was investigations made all right on the timber to look at it, but I am sure as far as a definite cruise it's my honest opinion that there was not. There may have been portions of it, but as a whole it was not.

Mr. Dezendorf: I think that's all at this time.

The Court: All right. You may step down.

Mr. Biggs: Mr. Gonyea.

(Witness excused.) [248]

WILFORD H. GONYEA

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Where do you live, Mr. Gonyea?

A. Here in Eugene.

Q. How long have you lived here?

A. I have lived here since about 1945.

Q. What is your occupation?

A. I am President of the Umpqua Plywood Corporation and General Manager of the Clear Fir Sales Company.

Q. Umpqua Plywood Corporation is a corporation engaged exclusively in the manufacture of plywood, is it?

(Testimony of Arthur Sherman Davidson.)

A. No, sir. We also manufacture lumber and certain other by-products and hardboard.

Q. And from your own timber tracts, or do you buy logs?

A. From our own timber and open-market logs, both.

Q. What is the Clear Fir Company?

A. The Clear Fir Company is a marketing organization for marketing not only the products of the plants that we own ourselves, but also marketing for other organizations on a contract relationship.

Q. Are you related to Henry Gonyea—

A. I am his son. [249]

Q. —who has previously been identified in the record? A. I am his son.

Q. You are his son? A. I am his son.

Q. When did you first come to Eugene, Mr. Gonyea, and in what connection?

A. Well, I first came to Oregon—to Mapleton or Eugene?

Q. Mapleton, that's what I meant.

A. In 1940. For the first year I was there about 50 per cent of the time and thereafter full-time more or less representing my father and his partner who was interested in Siuslaw Forest Products.

Q. Did you work directly with Mr. Davidson?

A. Yes; I was his assistant.

Q. What was Mr. Davidson's connection with the company?

A. Mr. Davidson was Resident Manager at Mapleton.

(Testimony of Wilford H. Gonyea.)

Q. And you were given the title of Assistant Resident Manager, were you?

A. Well, we—I was Assistant Manager. I don't know about the title. But that's what——

Q. The first year you say you were there about half of the time and the next year, and from that time on you were there full-time as long as you retained a connection with the company, is that correct? A. Right. [250]

Q. Had a mill been constructed in 1942, Mr. Gonyea?

A. No. The reason I was there this half-time is because we were just opening the property up. There wasn't enough to require full-time. We started building the mill, as I remember it, in '41 and completed it in '42.

Q. Do you remember about when in '42 it was completed?

A. My best recollection is in the fall.

Q. The fall of '42? A. Yes.

Q. So that this timber purchased, the Seaver tract, occurring in May of '42 was a few months prior to the actual completion of the mill——

A. Yes.

Q. ——according to your recollection, is that correct? A. Yes.

Q. What was Siuslaw doing with its logs, the logs that you were then taking out of the forest in 1940, '41?

A. We were selling them on the open market.

(Testimony of Wilford H. Gonyea.)

Q. What kind of logs were you selling, Mr. Gonyea?

A. Well, everything that came off the tract; old-growth fir, second-growth fir, spruce, hemlock, some cedar.

Q. Was there a market for second-growth logs at that time, speaking now of '41, '42? A. Yes.

Q. Who were your principal markets or purchasers at that [251] time, Mr. Gonyea?

A. We weren't bringing out very much second-growth at that time because we were logging a primary old-growth area.

Q. Yes.

A. What second-growth did come out went to the mills right there on the river.

Q. Were you cold-decking some of it in anticipation of the operation of your own plant?

A. No. We didn't cold-deck logs. We had plenty of water storage there.

Q. You had plenty of water storage?

A. That's right.

Q. What utilization—well, I will ask you this: In your experience here in Lane County and prior to 1942 did you make any investigation of the market situation with respect to second-growth timber products?

A. I made no investigation; just the knowledge that you acquire from the ordinary business practice of selling lumber and lumber products.

Q. Did you have some acquaintanceship with the market? A. Yes.

(Testimony of Wilford H. Gonyea.)

The Court: Before 1942?

The Witness: Yes, sir.

The Court: How long have you been in the lumber business?

The Witness: Since 1927. [252]

The Court: Oh.

Q. (By Mr. Biggs): You were in the lumber business in Washington prior to coming to Portland? A. Yes—correction on that.

Q. Prior—

A. I was in the door manufacturing business closely allied with the lumber business. Our primary business was the manufacture of doors and in connection with that we had mill connections with lumber and handling of lumber products, too.

Q. Then you acquired some familiarity with the lumber market in Lane County and Western Oregon prior to 1942? A. That's right.

Q. What utilization was made—commercial utilization was being made of the second-growth timber in 1942 and the time prior thereto that you are familiar with?

A. Well, second-growth timber was made into poles, pilings; in the lumber products, primarily in dimension, car-decking, studs, general construction material.

Q. Now, if you will take just a minute or two you can educate all of us just a little bit, or at least you can educate me on what is dimension lumber.

A. Dimension is the ordinary lumber that goes

(Testimony of Wilford H. Gonyea.)

into the building of homes: 2 by 4's, 2 by 6's, 2 by 10's, 2 by 12, anywheres from 8-foot to 24-foot in length.

Q. Was second-growth being manufactured for that purpose at [253] that time? A. Yes.

Q. What are studs?

A. Studs are 2 by 4, 8-foot.

Q. What, then, are some of the other terms you used? Car-decking?

A. Car-decking is used in the manufacture of railroad cars. In the old days they were making a good many more wooden floors then they are today, although they still use wooden floors to a great extent in boxcars.

Q. Who were the purchasers?

A. Railroads.

Q. Was that a considerable market in itself?

A. Yes, it was.

Q. Any other special uses other than saw logs?

A. No; not that I have in mind.

Q. Was it used at all at that time for interior furnishings?

A. A second-growth log is not a clear log; it's a dimension log. It lends itself more readily to that construction type of material.

Q. Yes. Now, are you familiar with the discussion of the associates who formed the Siuslaw Forest Products, of their program in this area, what they were planning when they came into Oregon?

A. They had a long-range program in view, to

(Testimony of Wilford H. Gonyea.)

establish a [254] utilization, an organization there, for converting the timber that they were acquiring.

Q. Would you just expand on that a little bit? You say a long-range program. What did you mean by that?

A. Well, we were buying timber whenever we could find it in as large quantities as we could procure, with the knowledge that it would be a long-time operation, be considerable time before we would use it up and, as a result, contemplated the first demand for the building of a sawmill. And as we continued on we would have undoubtedly been a plywood plant, too. But we had a program in mind of establishing an integrated lumber industry there for a long-range operation.

Q. By a long-range you mean a permanent operation in the sense of even acquiring timber on a perpetual cutting program, for a perpetual cutting program?

A. That question is a very intricate one. There is the question of Forest Service reserve or things of that sort. We were not on a sustained-yield program operation within our own company, no.

Q. Well, now, did you participate in any of the negotiations for the purchase of the Seaver tract, Mr. Gonyea?

A. I sat in on several of the discussions regarding the purchase of the Seaver tract.

Q. The actual responsibility to consummate the deal was left to Mr. Davidson and the senior associates, isn't that correct? [255]

(Testimony of Wilford H. Gonyea.)

A. Mr. Davidson and Mr. Lewis were both considered experts in that particular field, and that was the—well, actually, we all went down there because Mr. Davidson's knowledge on timber——

Q. You all what?

A. Went to Mapleton or invested in Mapleton because of Mr. Davidson's primary knowledge of timber.

Q. I see. Well, did he discuss with you, then, what the interest of the group—or whether the group would be interested in acquiring the Seaver tract?

The Court: Do you want to take an exception?

Mr. Dezendorf: I thought the question was going to be broader than it was. That one I have no objection to.

The Court: All right. Go ahead.

The Witness: The Seaver tract——

Mr. Dezendorf: Well——

Mr. Biggs: Answer the question Yes or No. Mr. Gonyea.

The Witness: Will you repeat it, please?

Q. (By Mr. Biggs): Did Mr. Davidson discuss with you the purpose of buying the Seaver tract or the likelihood of your associates being interested in buying the Seaver tract, the purposes for purchasing it and that sort of thing? Did you talk it over with Mr. Davidson, is a simpler way to state it?

A. Yes.

Q. In the conversations between Mr. Davidson

(Testimony of Wilford H. Gonyea.)

and Mr. Warlick [256] that you may have heard or participated in——

The Court: What is that again?

Q. (By Mr. Biggs): In the conferences between Mr. Warlick and Mr. Davidson for the purchase of this tract which you may have heard or participated in——

The Court: He didn't say he participated in any of these.

Mr. Biggs: He said he sat in on them and heard them, your Honor, if I am not mistaken.

The Court: I thought he sat in on discussions. I thought that referred to the Board of Directors or to the business.

The Witness: Both of them, your Honor.

The Court: Did you hear some of the conversations with Mr. Warlick?

The Witness: Yes.

The Court: All right. Go ahead.

Q. (By Mr. Biggs): Would you state what the discussions were with respect to the extent of the timber that Mr. Warlick was offering to sell to Mr. Davidson?

A. May I add to that in general conversation, your Honor?

The Court: Yes. Just limit it to the conversation that took place between Mr. Warlick and Mr. Davidson in your presence.

Mr. Biggs: That is correct.

The Witness: We were very informal in our discussions down there, very informal in any line of

(Testimony of Wilford H. Gonyea.)

authority within the [257] business, and for that reason I was able to speak up in some of the meetings.

Your question is specifically regarding quantities?

Q. (By Mr. Biggs): I wanted to ask a series of questions, but did you hear them discuss how much of the timber on that tract was to be conveyed? A. No.

Q. You did not?

A. How much of the timber? All of the timber, but not in footage, not in terms of footage.

Q. I am not talking about that. A. Yes.

Q. Quantitatively did you hear the discussions as to whether it was to be all or part of it or only certain species, or what?

The Court: I think he ought to be a little more specific. Will you tell us now what the conversation was? And if you participated in the conversation you tell us what you said.

Mr. Biggs: Yes.

The Witness: All right. For a period of several months Mr. Warlick was very anxious to sell his timber and he called on us in connection with other business matters as well as this, and in each instance there would be some discussion about the prospect of closing a deal on this timber. Our organization was not particularly anxious to buy the timber at first because [258] it was a long-range deal. But finally Mr. Warlick was anxious to get the money out of the deal and, as Mr. Davidson indicated, he is a pretty good bargainer, and they

(Testimony of Wilford H. Gonyea.)

bargained back and forth discussing the thing, at all times we feeling—now, I can't remember specific words—but never——

The Court: All right. Now, this is all preliminary.

Mr. Dezendorf: And I move that it be stricken.

The Court: Well, I think it's just background. But now we are getting down to the main issues. What was said by Mr. Warlick or by Mr. Davidson with reference to the timber? Was any portion of the timber to be retained? Was it all to go? Were certain species to go? Were certain species to be reserved? That's just generally. You tell us specifically what the conversation was as best you can remember. If you can't remember the exact words, give us the best recollection you have.

The Witness: All right. There was nothing to be reserved by Mr. Warlick except a few cedar trees, as I understand it or remember it. The cedar in the tract from—in that country is very poor cedar, anyhow, and it was of no import to us. If we were to get anything that was up there on that tract of land that we could make usable or make some money out of it, the conversation——

The Court: What was said?

The Witness: Well, goodness, sir, we met fifteen or [259] twenty times. Discussions go on and you bargain back and forth on money.

Mr. Biggs: If you don't remember, Mr. Gonyea, say so.

The Witness: The exact words——

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: The Judge didn't ask you for exact words. If you remember the substance, tell what the parties were talking about.

The Witness: The substance of it was that we were to get the timber that was on the property.

The Court: Was there any argument between Mr. Warlick and Mr. Davidson with reference to the quantity? In other words, you said that Mr. Davidson was a good bargainer as far as price was concerned. Did he ask for more timber and was there any argument about the amount of timber?

The Witness: I can't remember specifically. There undoubtedly was.

The Court: Was there any conversation with reference to old-growth as compared to second-growth?

The Witness: No, sir.

The Court: All right. Go ahead.

Mr. Biggs: All right.

Q. Were you present at the Board of Directors meetings when the offer was reported, if it was reported, by Mr. Davidson to the Board of Directors for authority to consummate the transaction? [260]

Mr. Dezendorf: I think I would have to object to that. I think that's going a little far to bind us with what they may have said in the Board of Directors meetings.

Mr. Biggs: I am reflecting an intention, if the Court please, of the parties to show what Mr. Davidson intended and Mr. Warlick intended. I think if this witness recalls it we can show what the discussions were in the Board of Directors.

(Testimony of Wilford H. Gonyea.)

The Court: I am in doubt as to the ruling on this one. Because if there was some pleadings in the case to substantiate an allegation of reformation based upon mutual or unilateral mistake, this testimony might be admissible. But on the state of the record and in view of the Rules of this Court I don't see how a statement made by Mr. Davidson or Mr. Gonyea to the Board of Directors would tend to prove or disprove any issue in this case.

Mr. Biggs: I don't make claim very much for it except this: That is might be proof of an intent of one of the parties.

The Court: All right.

Mr. Biggs: But we will pass that over.

The Court: Objection is sustained.

Q. (By Mr. Biggs): Now, to your knowledge were there mills in the area in 1942 and prior to that time exclusively engaged in the manufacture of second-growth timber, Mr. Gonyea?

A. Exclusively? I couldn't tell you if they were exclusively [261] engaged in it. But substantially engaged in it.

Q. Were there mills substantially engaged in the manufacture of second-growth timber prior to May 4th, 1942? A. That's correct.

Q. To your knowledge? A. That's right.

Q. Were those the products you enumerated earlier?

A. Yes; some of those products were made by them; yes.

Q. Here in Lane County? A. Yes.

(Testimony of Wilford H. Gonyea.)

Q. What about the hemlock? How was it utilized or what market was there for hemlock in 1942?

A. The lumber market on hemlock was limited, but there was an excellent market as far as pulp logs.

Q. For what?

A. For the pulp logs for the manufacture of paper.

Q. Do you know who was buying hemlock logs?

A. Crown-Zellerbach and Oregon Pulp & Paper were both buying them.

Q. Is that in the late 30's and early 40's as well as later on in the 40's? A. That's right.

Q. Yes. Would you consider, then, that hemlock was a commercially useful product, timber product, in 1942? A. Yes. [262]

Q. Did your company sell any hemlock to Crown-Zellerbach? A. Yes, we did.

Q. And commencing when, Mr. Gonyea, if you recall, in your first logging operations did you—

A. Very shortly thereafter. My best recollection is that we sold hemlock down—loaded it down at Siboco—

Q. To whom?

A. We loaded it at Siboco Slough.

Q. Oh.

A. And sold it to Crown-Zellerbach, if I am right.

Q. And continuously thereafter have you supplied Crown-Zellerbach?

A. Well, until we left the company.

(Testimony of Wilford H. Gonyea.)

Q. Until you left the company? A. Yes.

Q. When did you leave the company?

A. In 1945 when the deal was made with U. S. Plywood.

Q. At that time U. S. Plywood acquired majority control of the corporation? A. That's right.

Q. That's when you ceased having a direct connection with this operation?

A. I ceased very shortly after that.

Mr. Biggs: Very shortly after. That's all. You may cross-examine. [263]

The Court: We will take a ten-minute recess.

(Recess taken.)

The Court: All right, Mr. Dezendorf.

Cross-Examination

By Mr. Dezendorf:

Q. As I recall your testimony, Mr. Gonyea, you were not bringing out very much second-growth timber before 1942.

A. I think that's correct.

Q. Actually, all you were bringing out was what you had to fell——

Mr. Biggs: Was there an answer to that question, or was it a question?

Mr. Dezendorf: Yes.

Mr. Biggs: What was your answer?

The Witness: Yes.

Q. (By Mr. Dezendorf): Actually, all you were

(Testimony of Wilford H. Gonyea.)

taking out was what you would fell in taking out your old-growth?

A. No; that isn't quite right.

Q. What is the fact?

A. When you say what we had to fall in order to take down our old-growth——

Q. Yes.

A. ——we took it as a matter of timber harvesting in the area. The type of timber that we were in was substantially [264] old-growth, smaller amounts of second-growth, and second-growth in certain areas of the logging show. It wasn't necessarily intermingled with the old-growth. And it could be standing by itself along creek bottom, or something of that sort.

Q. But you were primarily interested in old-growth?

A. We were primarily taking out old-growth.

Q. Yes. Now, would you mind naming the mills for me that you say were buying second-growth in that area in 1941 and 1942?

A. Orval Phelps.

Q. Anybody else?

A. Ray Swensen was cutting some second-growth.

Q. No. I am talking about mills that you said you sold to.

A. Swensen Lumber Company. Oh. That we sold to.

Q. That was my question.

A. Oliver LaDuke.

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: Who was that?

The Witness: LaDuke.

Mr. Biggs: Is that L-a or L-e?

The Witness: L-a capital D-u-k-e.

Q. (By Mr. Dezendorf): What price were you getting for your second-growth logs that you sold and delivered to Mr. LaDuke?

A. I can't tell you right now.

Q. It was \$6.00 delivered at the mill at Florence, wasn't it? [265]

A. I can't tell.

Q. Does that sound about right?

A. It doesn't sound reasonable, no.

Q. Now, what other mill—to whom were you selling second-growth in '41 and '42?

A. We sold second-growth to a mill on the North Fork, Mr. Dezendorf. I am hazy as to whether that was in '41 or '42 or maybe a little after '42. But in that general time we were selling second-growth to this mill on the North Fork.

Q. You don't know——

A. Harry Beech. The Beech——

Q. But that might have been later?

A. It could have been.

Q. What about LaDuke. Could that have been later, too?

A. No.

Q. All right. What other mills?

A. Well, those were the——

Q. In '41 or '42?

A. Those were the mills that were on the Siuslaw River at tide-water at that time.

Q. So those would be the only ones?

A. That's right.

(Testimony of Wilford H. Gonyea.)

Q. Now, is it your statement that you were selling hemlock to Oregon Pulp & Paper Company in 1942?

A. We were selling hemlock to either Crown-Zellerbach or [266] Oregon Pulp & Paper Company in 1942.

Q. Where were they taking the hemlock to process it?

A. They would take it to pulp—they call it the pulp station—there on the Columbia River—the Willamette River just out of Oregon City.

Q. How would it go, by rail? A. By rail.

Q. Where would it be loaded to rail?

A. Down at Siboco. Siboco Slough. That is across the river from Cushman.

Q. And you were pretty sure you were selling hemlock logs to them in 1941 and 1942?

A. In 1942 I am quite sure we were.

Q. Before May?

A. Well, I'd have to see the invoice. But in that general time we were selling to them.

Q. I don't believe this was asked of you on direct; at least, I didn't hear it. Did you have something to do with the preparation by a lawyer of the May 4, 1942, Warlick-Siuslaw contract?

A. Not to my recollection.

Q. Do you know who drew it?

A. I happen to know who drew—or whose firm name is on the contract because I have seen the contract. But I don't know which one of the attorneys in the firm drew it. [267]

(Testimony of Wilford H. Gonyea.)

Q. And you would only know it from what you have seen on the contract and not otherwise?

A. Yes.

Q. And you had nothing to do, then, with the preparation and drawing of that May 4, 1942, contract as far as you know? A. That's right.

Q. Did you happen to read that May 4, 1942, contract before it was executed?

A. I wouldn't remember, sir.

Q. You have no way of knowing?

A. I couldn't remember whether I actually read it. I undoubtedly did, but I am not specific on it.

Q. Did you know then that all you acquired under the contract was the merchantable timber?

A. Well, we acquired the timber that was on the land. That's what we bought.

Mr. Dezendorf: I don't think that's an answer to my question.

Mr. Biggs: I think that's an answer, if the Court please, because merchantable timber may very well, and this—and in this case we contend it does, mean just that.

The Court: Ask him another question. I am not going to strike that one. But ask him—get more specific with him if you want.

Mr. Dezendorf: All right. [268]

Q. Did you know at or about the time the May 4, 1942, contract was executed that it conveyed only the merchantable timber?

Mr. Biggs: Just one moment, if the Court please.

(Testimony of Wilford H. Gonyea.)

That calls for a conclusion of law. I think if Counsel wants to ask in the words of the contract itself. If he was familiar with that wording, I'd have no objection. But to ask him if he knew it required only merchantable timber puts the witness in the position of having to decide what is merchantable timber within the meaning of Mr. Dezendorf's definition. I think it calls for a conclusion.

The Court: I think that the thing is objectionable for another reason, the use of the word "only."

Mr. Biggs: Yes.

The Court: That indicates they bought something less than all. And the witness has already testified that he bought all.

Mr. Dezendorf: May I ask another question, your Honor?

The Court: All right; go ahead.

Q. (By Mr. Dezendorf): Mr. Gonyea, at or about the time the May 4, 1942, contract was executed did you know that it provided that Siuslaw agreed to purchase and remove all of the merchantable old-growth and second-growth fir and hemlock timber?

A. That was the customary provision in any contract for the [269] purchase of timber.

Mr. Dezendorf: I don't think that's an answer to the question.

The Court: Are you reading from a contract? Is this the contract?

Mr. Dezendorf: I am reading from the language of the contract.

(Testimony of Wilford H. Gonyea.)

Mr. Husband: If the Court please, I don't think Mr. Dezendorf—if he is going to ask that question, I think he ought to ask it in the words of the contract.

Mr. Dezendorf: I did. I am reading from Paragraph 3 of the Pretrial Order.

Mr. Husband: "Now growing."

Mr. Biggs: Just read the whole thing, Mr. Dezendorf, and put quotes before and after it.

The Court: Paragraph 3 of the——

Mr. Dezendorf: Of the Pretrial Order, the Agreed Facts.

The Court: Let me see the contract. " 'All of the merchantable old-growth and second-growth fir and hemlock timber, either standing or down, and now growing or located' upon the real property above described * * * "

Mr. Dezendorf: That's correct.

Q. Did you know, Mr. Gonyea, at or about the time that the May 4, 1942, contract was executed that Siuslaw agreed to purchase and remove all of the merchantable old-growth and [270] second-growth fir and hemlock timber?

Mr. Biggs: Now, standing, laying or growing—do you want to give him the whole thing, Mr. Dezendorf, or is that important to you?

Mr. Dezendorf: Well, it isn't important to me.

Mr. Biggs: I object to it, if the Court please, because if he goes to call for the witness' construction of the contract he should use the words of the contract.

(Testimony of Wilford H. Gonyea.)

Mr. Dezendorf: I am not asking for the construction; I am asking him if he knew that's what the contract provided.

The Court: Well, then, I am going to sustain the objection on the ground it's words taken out of context. I think that you have been asking him if he knew that the contract provided thus and so.

Mr. Dezendorf: And trying to quote it, yes.

The Court: All right. All of the merchantable old-growth and second-growth fir and hemlock timber either standing or down and now growing or located upon the following described real property.

The Witness: Yes.

The Court: Go ahead and ask him your question.

Q. (By Mr. Dezendorf): Do you know that it so provided? A. Yes.

Q. Mr. Gonyea, is it a fact that the Forest Service in the Siuslaw area was the biggest owner and seller of timber in that [271] area in 1942 and subsequent thereto?

A. They were substantial.

Q. Were they not the largest?

A. I am not familiar with it, offhand. There is a lot of private holdings on the south side of the river and the Forest Service was on the north side.

Q. I see.

A. And whether it was in the Alsea watershed or the Siuslaw is another matter.

Q. Do you know as a fact that the first sale of

(Testimony of Wilford H. Gonyea.)

second-growth timber by the Forest Service, Mapleton office, was in 1943? A. No, I did not.

Q. Did your company while you were with it ever buy any second-growth from the Forest Service?

A. We bought very little timber from the Forest Service. Our timber was almost entirely on private purchase, and I can't recall a specific purchase of Forest Service timber.

Q. I believe in direct examination you said that your understanding of the conversation between Mr. Warlick and Mr. Davidson prior to the execution of the contract was that cedar trees were to be expressly excluded. Did I understand you correctly?

A. There was a discussion to that extent, or to that point, yes. [272]

Q. That was supposed to be incorporated in the contract, as you understood it?

A. No. They agreed in bargaining that we were not to get the cedar trees.

Q. Both you and Mr. Davidson were aware of that?

A. Yes. I would like to—may I amplify that?

The Court: Go ahead.

The Witness: That is the memory that comes back to me of the discussion of this. And as much—I am sure that that was part of the discussion I heard. I can't remember specific words that were said to that effect. But in the general bargaining like they would bargain back and forth about second-growth, in connection with the value of the tract

(Testimony of Wilford H. Gonyea.)

the question of cedar came up and "The cedar down there is poor and we don't want it."

Q. (By Mr. Dezendorf): Well, did I understand your direct examination correctly that you say there was no conversation about old-growth or second-growth?

A. As to—depending upon the interpretation of what the discussion was to be. There was no discussion as to the values—relative values of the two species.

Sure there was discussion about second-growth in that Mr. Davidson would bargain for the stuff.

Q. Isn't it a fact Mr. Davidson told Mr. Warlick he didn't want any second-growth? [273]

A. Well, he was bargaining.

Q. Did he say that?

A. He was bargaining.

Q. Did he say that?

A. Not in my presence.

Q. He didn't say that?

A. Not in my presence, not that I remember in specific words.

Q. Was there anyone else in your organization there in May of 1942 who would have handled the contacting of a lawyer to draw this May 4, 1942, contract other than Mr. Davidson and yourself?

A. It could have been—I wouldn't have—that wasn't within my premise down there in the position I was in. It could have been my father or it could have been Mr. Lewis—Mr. Joe Lewis in Seattle. It could conceivably have been Mr. Lewis'

(Testimony of Wilford H. Gonyea.)

partner, Mr. McKee, too, who came down quite often.

The Court: Have all the lawyers in that Harris, Bryson firm been contacted to find out if they drafted the contract?

Mr. Biggs: Mr. Husband can answer that better.

Mr. Husband: May I answer that?

The Court: Yes.

Mr. Husband: When this case was first started, the trouble first arose over it, Mr. Manley Strayer and I first [274] went to Mr. Judge Harris and then to Mr. Bryson. I have not talked to Judge East. But I know perfectly well that it was Judge East that drew that contract.

The Court: He told me he didn't.

Mr. Husband: Well, I think he would have to see it. But there is nothing—I think we are all trying to shy away from that contract now because it's a respectable contract.

The Court: I am not.

Mr. Husband: I just think that Judge East drew it.

The Court: There is a name of E. N. Eisenhower on it. Did he draw the contract?

Mr. Biggs: Is that on the cover?

The Court: Yes. E. N. Eisenhower, Puget Sound Building, Tacoma, Washington.

Mr. Husband: That's his copy.

Mr. Biggs: I think the original one is on Harris, Bryson & East.

(Testimony of Wilford H. Gonyea.)

The Court: Yes. It's his name on there. All right.

Mr. Biggs: Well, to finish that, did you talk with Mr. Bryson and Judge Harris, both?

Mr. Husband: We have talked to them both, and I am just as sure as shooting that Judge East drew the contract.

Mr. Biggs: I wonder if Judge East has ever seen the original contract.

The Court: It came up because I told him I thought that [275] I would try this case whether he came down to Eugene or not, because Mr. Dezendorf and Mr.—what is your name again?

Mr. Biggs: Hugh Biggs. Haven't been married since we started this.

The Court: I told him that I talked to you two fellows and you had suggested that I had better try this case because he might have drafted the contract. He says, "Oh. I don't have any recollection of this man Seaver." But at that time I never knew that Warlick was the man who was the owner of that tract.

Mr. Biggs: Yes.

The Court: And I didn't read the pretrial order till I got down to Eugene. So maybe I will talk to him again.

Mr. Biggs: I think sometimes if a law——

The Witness: He told me he couldn't remember it in connection with Warlick either.

The Court: Oh.

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: He'd have to see the contract. Sometimes a lawyer——

The Court: He has told Mr. Gonyea he doesn't remember Mr. Warlick either. The only thing he told me, he said that he recalls that he had done some work for Mr. Gonyea. That's the only thing he recalls.

The Witness: Yes.

Mr. Dezendorf: No further questions. [276]

Redirect Examination

By Mr. Biggs:

Q. Just to leave it perfectly clear—I don't want to beat a dead horse, but in view of the statements or the questions that were asked you about what the contract provided, in your statement that you were familiar with that proposition of the contract which the Court has read to you—I will ask you this question: Was that inconsistent in your mind with your thought that you were getting all the timber on the property?

Mr. Dezendorf: I would object to that.

The Court: Objection overruled.

Mr. Biggs: That's all.

The Court: This comes under the same line of interrogation as to what his intent was. And I know that you have an objection to this whole line of testimony.

Mr. Dezendorf: Well, I objected to that on the grounds that it was argumentative and calling for a conclusion.

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: Which?

Mr. Dezendorf: This last question.

The Court: All right. Objection overruled.

The Witness: It was.

Mr. Dezendorf: I am sorry. I didn't hear it.

The Witness: It was.

The Court: He answered that it was. All right. Ask the question over again. I will tell you what it was. It was: [277] Was there any discrepancy between the statement that I read to you and your understanding of what you were to get?

The Witness: No.

Q. (By Mr. Biggs): That is, you thought that that provision of the contract gave you all the timber on the land, is that correct?

Mr. Dezendorf: I would object to that question, your Honor, and I ask that the witness' answer be stricken until I can make my objection.

The Court: All right. He has answered. He denied——

Mr. Biggs: I think we phrased it differently. I think I said "consistent" and you said "inconsistent," or the other way, calling for a different—that is the reason I wanted the question read.

The Court: No. His answer is based upon the fact that cedar was excluded.

The Witness: Well, my answer to it was this, sir: I understood was there any conflict in the wording of this contract that was read with what I thought that we were going to get, including all of the timber that we were supposed to get off the land, and I couldn't see any inconsistency with it.

(Testimony of Wilford H. Gonyea.)

The Court: All right.

Q. (By Mr. Biggs): You thought under that contract——

The Court: I think he has answered that question.

Mr. Biggs: Very well. That's all, then, Mr. Gonyea. [278]

Will Mr. Phelps take the stand, please? Is there any desire to hold this witness?

The Court: Do you want Mr. Gonyea?

Mr. Dezendorf: No.

The Court: Mr. Gonyea, you are excused from any further attendance at the trial.

(Witness excused.) [279]

ORVAL PHELPS

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

The Court: How many more witnesses do you have?

Mr. Biggs: I was just counting up. They are all lined up here. Mr. Gibson will be the next witness. Mr. Gibson and Mr. Graham. Before the company witnesses—I was going to try to get the others in before I put on company witnesses. Probably five or six.

The Court: Five or six? Well, I was just going to tell you—when are you going to have your rebuttal witnesses here?

(Testimony of Orval Phelps.)

Mr. Dezendorf: Well, I take it that he doesn't expect to finish tonight.

The Court: He will not finish today.

Mr. Biggs: Probably not, your Honor.

Mr. Dezendorf: We will have them here in the morning.

Direct Examination

By Mr. Biggs:

Q. You have stated your name. Where do you live, Mr. Phelps?

A. I live in Eugene now.

Q. How long have you live in Eugene?

A. About four years.

Q. I should have said Lane County. How long have you lived in Lane County?

A. Sixty years. [280]

Q. Sixty years. That's getting pretty near to your age, isn't it, Mr. Phelps?

A. Pretty close.

Q. What is your occupation at the moment?

A. Retired.

Q. What has been your occupation during most of your active life?

A. Logging and lumbering on small scale.

Q. In what areas, Mr. Phelps?

A. The Western Lane County area.

Q. Being even more specific, could you identify it with reference to Mapleton?

A. Deadwood Creek, Indian Creek, and in the Mapleton—close Mapleton area where our last mill was, which now is Mr. Davidson's mill.

(Testimony of Orval Phelps.)

Q. How long were you engaged in operations in that area? A. Beginning in 1926.

Q. Yes.

A. And continuously until we sold the mill to Mr. Davidson in 1954.

Q. '26 to '54, is that correct?

A. (Witness nods head.)

Q. Referring to Defendant's Exhibit 51, being a vicinity map of Lane County, I will ask you, Mr. Phelps, if you can identify your location on that map with respect to the Seaver [281] tract and to Mapleton, and I will direct your attention to the left end over there?

A. This little Post Office, Reed, right here was our mailing address from 1935 till the Post Office was discontinued: The year I don't remember.

Q. Now, Reed is in the northwest—oh. That's in— A. Here is 10. 10. 16, 10.

Q. In Lincoln County? A. No—yes.

Q. That would be the northwest section of Lane County, is that correct?

A. These look like our operations right here (indicating).

Q. You are indicating an area marked out in yellow? A. That's right.

Q. All right. Now, where is Mapleton from there? A. Oh, it's on down to—

Q. Circle it if you find it, or you may use your reference. A. Right in here is Mapleton.

Q. Are you familiar with the tract of land that is the subject of this controversy, this so-called

(Testimony of David Phelps.)

Seaver or Washick tract? A. No, sir.

Mr. Briggs: You do not know where that is. I believe that has been identified your Honor as the section in red.

Q. Was that so pointed out to you when you saw the map originally? [182]

A. That's right.

Mr. Briggs: Do you want to see this, Mr. Dezen-
dant? It's just a vicinity map and I just wanted to
locate his operations with respect to—

The Court: His operations are marked in
yellow?

Mr. Briggs: Yes.

The Court: The Mapleton is marked with a
circle?

Mr. Briggs: If that has not been altered, I
would like to.

The Court: What number?

Mr. Briggs: 32, I believe.

Mr. Dezendant: It's already been received.

Mr. Briggs: Has it been marked received?

The Clerk: Yes. It hasn't been marked, but it
has been received.

The Court: All exhibits to which there were no
objections have been admitted in evidence.

Mr. Briggs: And the Reporter can complete the
record.

The Court: Let's get down to—

Q. (By Mr. Briggs): Were there other locations
in this same area? Did you have other mills than

(Testimony of Orval Phelps.)

this precise place? A. Only one at a time.

Q. Only one at a time. Now, let's take the one that you were operating nearest in point of time to the years prior to and during 1942. And where was it located? [283]

A. That would be in the Reed area.

Q. That would be the area that you just pointed out, is that correct?

A. (Witness nods head.)

Q. Now, what was the nature of that operation? Just describe it to the Court if you will.

A. You mean what did we produce?

Q. Yes, sir.

A. Mostly 3 by 12 bridge plank and railroad ties. The cut was pretty much balanced between those two in volume.

Q. Did you own and operate a mill?

A. Yes.

Q. At that area? A. Yes.

Q. What was the source of your timber, your own ownings, or were you buying logs?

A. In that mill we were buying logs by stumpage plan.

Q. From timber owners, is that correct?

A. Owners. We did not buy the land.

Q. Doing your own logging?

A. Some of it we logged ourselves, and some of it we bought in form of logs on roll-away and then we trucked ourselves. Had a small operation. And there was quite a variety of how the logs actually got there.

(Testimony of Orval Phelps.)

Q. What kind of timber were you buying? [284]

A. Exclusively second-growth.

Q. Nothing but second-growth?

A. Nothing but second-growth. It was a small mill.

Q. Yes. And what——

The Court: You said a small mill. What do you mean, 50,000, twenty-five?

The Witness: Under twenty.

The Court: Under twenty.

Q. (By Mr. Biggs): Under 20,000 board feet a day? A. (Witness nods head.)

Q. Over what period of time, now, did you operate that mill?

A. That mill was built in the early spring, February, March and April of 1940, and was operated there until the 14th of July, which was the day it burned.

Q. Of what year? A. Of '44.

Q. Of 1944? A. '44.

Q. To whom were you selling your end products?

A. Such companies as—I believe we sold some from there to Nebraska Bridge and Supply Company. We sold some to the Munroe Lumber Company in Eugene. I am—yes. I am quite sure that we sold some from that mill to Clear Fir Sales.

Q. Did you have a ready market for all of your products from the mill during those years? [285]

A. Yes, sir.

Q. And had you at other locations during——

(Testimony of Orval Phelps.)

A. Yes, sir.

Q. —your years of operation from 1928 until 1944? A. Yes, sir.

Q. Yes. Was there any particular change in marketing conditions, say, from '41, '42, '43—

A. Except that the market—the price got a little better. But the materials were acceptable, I would say, through the same channels. But the war brought on, of course, better prices. And that was about the only change I would—

Q. Had you logged out this area near Reed that's marked on the map in yellow prior to the fire?

A. Not all, no.

Q. Did you subsequently log it out?

A. After the mill burned we did log the rest of it and take it to where the mill was located next.

Q. Yes. Approximately how many thousand board feet of timber did you buy for your mill at the Reed location?

A. Possibly—possibly 5,000,000 feet.

Q. That you logged out over a period of years?

A. Four years.

Q. Exclusively second-growth, is that correct?

A. Over the four years, I believe so.

Q. What other locations did you have or did you operate at [286] prior to the acquisition or the setting up of your mill at Reed? You say you had another location.

A. We had—we had an operation on Deadwood Creek. I forget the numbers of that. But it's just east of this Indian Creek country.

(Testimony of Orval Phelps.)

That was still——

Q. When you say “this Indian Creek country,” you are pointing to the map?

A. I am sorry. It was the map that you showed me here on the Judge’s desk.

The Court: The vicinity map.

Mr. Biggs: Yes, the vicinity map.

Q. (By Mr. Biggs): How far would that be from your plant at Reed?

A. The—by road it’s 25 miles. But it’s over in the next township.

The Court: I think we are getting a little far afield.

Mr. Biggs: All right. All right.

The Court: There was one thing I didn’t understand. How long had you been buying second-growth? Was it from 1928 or from 1940? I didn’t understand that.

The Witness: In 1926.

The Court: 1926?

The Witness: Yes.

The Court: To buy second-growth?

The Witness: Right. [287]

The Court: And were you in the area of Reed from ’26 to ’44?

The Witness: If the Deadwood township being just the next township over would be considered—we only moved that far. We just moved from one township to the other.

The Court: All right.

The Witness: The same general area; yes, sir.

(Testimony of Orval Phelps.)

The Court: Now, the operation which is marked in red on the vicinity map is where you were located from '40 to '44, as I understand it?

Mr. Dezendorf: Well, I think you are referring to the wrong map. It's the little one he is talking about.

Mr. Biggs: The vicinity map, the red, actually was identified as the Seaver tract.

The Court: Oh. The green.

Mr. Biggs: To show the relationship.

Mr. Dezendorf: It's yellow.

The Court: The yellow, rather.

Mr. Biggs: The yellow was Mr. Phelps' operation, and the red on the vicinity map was Mr. Seaver's tract.

The Court: You operated there from '40 to '44?

The Witness: I operated—Reed was our address from 1935 to 1944.

The Court: Well, where did you operate on these two tracts which are marked in yellow? What years? [288]

The Witness: That was from 1935 to 1944.

The Court: From '35 to '44?

The Witness: Yes, sir.

The Court: Now, you gave a figure of 5,000,000 feet, and I thought that you referred to the fact that you cut that amount of logs between '40 and '44.

The Witness: If I did, I didn't mean to.

The Court: All right. Now, tell us what the real facts are.

(Testimony of Orval Phelps.)

The Witness: I believe that all that is marked in yellow there would be about 5,000,000 feet.

The Court: And that was in a period of how many years?

The Witness: Nine years.

The Court: Nine years. Fine.

Q. (By Mr. Biggs): And, then, after 1944 you placed your mill and continued operation exclusively in the second-growth until '54? A. Yes.

Mr. Biggs: You may cross-examine. Just one other.

Q. (By Mr. Biggs): Were there other sawmills of your general type and character operating in Lane County to your knowledge exclusively in second-growth? A. Yes.

Q. Could you name some of them, Mr. Phelps?

A. Those—the name of those concerns escape me. For [289] example, there was one operation down there that we called the Irishman. Well, now, that wasn't their name, but we called them that. And that's what comes to my mind.

Mr. Biggs: Schwartz an Irishman?

The Court: Where was it located?

The Witness: It was located right at the mouth of Deadwood Creek, where Deadwood flows into Lake Creek.

The Court: How big a mill?

The Witness: It was about a twenty-thousand mill.

The Court: You said it was less than twenty

(Testimony of Orval Phelps.)

thousand. How much less than twenty thousand that you had?

The Witness: Our cut ran from twelve to eighteen thousand owing to what kind of luck we had that day.

The Court: And how many men did you have employed in the mill?

The Witness: Three in the mill.

The Court: Three in the mill besides yourself, or including yourself?

The Witness: Including myself.

The Court: Three in the mill. And how many others?

The Witness: One on the lumber truck, one on the log truck.

The Court: Fine. It was a small operation?

The Witness: Quite so.

The Court: And you think that that Irishman had a bigger [290] operation?

The Witness: Yes.

Q. (By Mr. Biggs): Are there other operations that you knew about, Mr. Phelps? Does the name Swensen mean anything to you?

A. Swensen?

Q. That's a Swedish name.

A. Roy Swensen was at Swisshome. They cut a mixed flow of logs.

Q. That was a larger operation than either you have described?

A. Yes. He was one of the big boys.

Q. And he was operating prior to and through

(Testimony of Orval Phelps.)

1942, was he? A. Yes.

Q. And any other operators that you know about?

A. There was another small mill, tie mill, ran neighbor to us. One of the proprietors' name was Hendricks. And I don't recall the other partner's name.

Q. Yes. Where was your last mill when you went out of business? Where was it located?

A. On the Siuslaw River three miles down from Mapleton, which is known now as the Davidson Industries Mill.

Q. That is Mr. Davidson, who was on the stand, bought that mill out? A. That's correct. [291]

Q. Was that exclusively a second-growth mill, too?

A. I operated it as such. What it is now I— I don't know just exactly what their practices are. But I opened it as a second-growth mill.

The Court: I don't think that that's important——

Mr. Biggs: Nothing else.

The Court: Ten years later.

Mr. Biggs: No. I just wanted to show it was continuous. That's all.

Cross-Examination

By Mr. Hoffman:

Q. Mr. Phelps, were you raised up in that country where your mill was? A. Yes.

Q. That is, you were born up there?

(Testimony of Orval Phelps.)

A. Yes.

Q. That's one of the old sections of the country, is it not? A. Yes.

Q. From whom were you buying your lumber, do you recall, at that time?

A. You said lumber. Now, I didn't buy lumber.

Q. Your stumpage.

A. You would want names or just general?

Q. Oh, names, if you recall. [292]

A. We bought timber from Ralph and John Taylor, from Charles Beers, from Thomas and Louis Beers.

Q. All right. Let me interrupt. Do you recall how much you paid for it?

The Court: What years are you talking about?

Mr. Hoffman: Well, start at the beginning, Judge, if that's convenient for him.

The Court: Go ahead and start in '35.

Q. (By Mr. Hoffman): Any that you can recall.

A. Our stumpage figure in 1935 was, possibly, 60 to 75 cents a thousand.

Q. Yes. Around 1940 had it gone up?

A. A little. When we moved the mill in the spring of 1940 that timber was to cost us either \$1.20 or \$1.25, and I can't recall now which it was.

Q. All right. Now, your mill, then, was in no way comparable to the mill of Siuslaw Forest Products? A. I should say that's correct.

Q. As a matter of fact, Mr. Phelps, you had a mill that could not handle a large old-growth log,

(Testimony of Orval Phelps.)

isn't that true? A. That's true.

Q. In other words, if you had had the finest old-growth log laying there you couldn't cut it up?

A. As a matter of fact, the occasional one we did sell.

Q. So you just weren't geared to handle old-growth? [293] A. Right.

Q. All right. Now, this area up there (indicating), what do you call it generally? What creek were you on, Indian Creek? A. Yes, sir.

Q. What was the road that served that area?

A. It was a County Market road, not——

The Court: Do you know the name of it?

Mr. Hoffman: Yes, I do.

The Court: Tell him.

Mr. Hoffman: May I approach the map?

The Court: Tell him.

Q. (By Mr. Hoffman): Was it County Market Road 45? A. Yes.

Q. It was established in 1888?

A. I expect that's right. That's a little ahead of me even.

Q. One of the oldest sections that was settled in the county; correct? A. Yes.

Mr. Hoffman: Your Honor, may I exhibit Plaintiff's Exhibit 31 to the witness?

The Court: Yes.

Q. (By Mr. Hoffman): This is a Lane County Market Road map which I think was prepared around 1920. And there appears to be a red circle on one of those roads—Market Road. Is that [294] about the area you were in?

(Testimony of Orval Phelps.)

A. Yes. That's—the road—the road took off there.

The Court: Louder.

The Witness: This—the road changes classification right there (indicating) and goes along both these streams here. And we were up on this stream (indicating).

Mr. Hoffman: If your Honor cares to see it, there is a small road circled——

The Court: What number is that?

Mr. Hoffman: 31, your Honor. I think it's in evidence.

The Court: Fine. And you said you were on this stream. What stream were you referring to?

The Witness: We were on the east branch of Indian Creek. Our operation was on the east branch of Indian Creek all the time. We were on Indian Creek.

The Court: All right. This is in evidence.

Mr. Hoffman: Yes, it is, your Honor.

The Court: All right.

Q. (By Mr. Hoffman): And the significance of the Market Road is that it gets more tax money to keep it up, am I correct?

A. I couldn't tell you about that.

Q. It was maintained by the County?

A. That's what they told us.

Q. What I mean to say is it was not a situation where you had to make your private road to get your lumber back to the [295] market. You came out——

(Testimony of Orval Phelps.)

The Court: Why don't you leave it the way it is? The County was supposed to fix it, but they didn't do a very good job at times?

The Witness: That's right.

Q. (By Mr. Hoffman): Was access to your timber any problem to you at your mill?

A. No. We procured timber reasonably close to the road. We built some road.

Q. Did you build anything like the ten miles into Mr. Seaver's property?

A. (Witness shakes head.)

The Court: He doesn't know where Mr. Seaver's property is.

The Witness: No. Well, by the—I could still say no. We didn't build any such road as that (indicating)——

Mr. Hoffman: All right.

Q. (By Mr. Hoffman): Now, when you were in the early 40's, 1940 and '42 and that time, did you buy any second-growth logs that were produced from the south of the Siuslaw River?

A. No, sir.

Q. Could you have afforded to haul them into your mill? A. No, sir.

Q. Just couldn't have hauled them in, could you? Couldn't get enough money out of them? [296]

A. (Witness shakes head.)

Q. Do you know how far it was by the road from your mill to the Seaver property in 1942?

A. No.

Q. If I told you it would be about 40 miles,

(Testimony of Orval Phelps.)

would you dispute that? A. No.

Mr. Biggs: How far?

Mr. Hoffman: 40.

Mr. Biggs: By road?

Mr. Hoffman: By road.

The Witness: No, I wouldn't.

Q. (By Mr. Hoffman): As a matter of fact, Mr. Phelps, could you afford at that time to haul the second-growth logs into your mill from any distance at all?

A. What was the last few words?

Q. Could you afford to haul a second-growth log at that time into your mill from any distance at all?

A. We did truck five or six miles.

Q. Was that a regular practice?

A. Somewhat regular.

Q. Was that a substantial portion of your cut?

A. Yes.

Q. All right. Now, was that all the time you were up in that area? [297] A. Yes.

Q. Now, most of the time you were adjacent to a County road with your mill; am I correct?

Mr. Biggs: Adjacent to what?

Mr. Hoffman: The County road.

The Witness: I'd say within a mile.

Q. Well, you tell me whatever it is.

A. We had a mill that was about a mile up the road.

Q. Was the other mill on the road?

A. Yes.

Q. Most of the time in the early 40's were you

(Testimony of Orval Phelps.)

on the road? A. Yes.

Q. All right. Now, how far was it from that mill in the early 40's to the railroad? A. 11 miles.

Q. Was that railroad at a place they called—is it Rainrock or Swisshome? A. Yes.

Q. The highway is also there on that side of the river? A. Yes.

Q. And the river itself, is that right?

A. Yes.

Q. Now, what did it cost you to produce your lumber in 1942, do you know? A. No. [298]

Q. Did you have any records? A. No.

Q. As a matter of fact, what you were trying to do was make yourself a job, isn't that right?

A. Yes.

Q. Well, let's say if you had had to pay two, three dollars a thousand and haul it any distance, could you have done it?

A. That could be true.

Q. Now, I think you told me—and I don't want to put words in your mouth here today—that you were getting \$4.50 a thousand for your lumber delivered—or on the car at the railhead; is that correct? A. Not then.

Q. When was it when you were getting four and a half?

A. Let's see—that must have been the late '29 and 30's, maybe '29 and '30, '31; along in there.

Q. When the war came along that strengthened the market, did it? A. That's true.

Q. Do you recall what you were getting for your lumber in 1942, the spring of 1942?

(Testimony of Orval Phelps.)

A. No; not closely.

Q. Would it have been about eight or nine dollars?

A. Could have been from eight—anywhere from eight to twelve. [299]

Q. That would be delivered on car at the railroad, is that right? A. That's right.

Q. Have you ever been into the Seaver tract?

A. No, sir.

Q. You don't know anything about the timber on that? A. Not a thing.

Mr. Hoffman: That's all. Thank you.

Mr. Biggs: That's all. Did you have a question, your Honor.

The Court: No. Are you through with Mr. Phelps?

Mr. Hoffman: Yes, we are.

The Court: Could you tell us one thing? When you were buying second-growth during the years '40, '41, '42, what was old-growth selling for in this particular vicinity?

The Witness: I don't know.

The Court: All right.

Mr. Biggs: Mr. Gibson, will you take the stand, please?

The Court: Mr. Phelps, you are excused if you want to go. We would like to have you here if you want to stay, but you don't have to.

The Witness: Thank you. I will listen.

(Witness excused.) [300]

ROY C. GIBSON

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Mr. Gibson, state your residence and occupation, please.

A. My residence is Albany, Oregon. I am a Consulting Forest Engineer.

Q. I think a Consulting Forest Engineer's duties have generally been explained. Is there——

The Court: Do you know Mr. Gibson, Mr. Dezendorf?

Mr. Dezendorf: I think so.

The Court: Are you satisfied with his qualifications? Go ahead and qualify him.

Mr. Dezendorf: No, for a reason.

Q. (By Mr. Biggs): What field do you specialize in?

A. Oh, problems in the timber industry. Timber cruising, engineering of various kinds, road locations, and things such as that.

Q. What academic training have you had?

A. I am a Forest School graduate in Engineering.

Q. Which school? A. Oregon State.

Q. Yes.

A. I am a licensed engineer, civil, in Washington, and logging [301] in Oregon.

(Testimony of Roy C. Gibson.)

Q. When did you embark on your career at the College?

A. I graduated in 1926 and licensed in '38 first, I think, as a professional engineer.

Q. In what parts of the country have you practiced your profession?

A. I came to Oregon in 1942 from Washington. Most of the time previous to that I had been in Washington.

The nine years previous to that I had been entirely in Washington. And previous to that, Provo.

Q. Were you engaged as an independent forester up there, or were you employed with a lumber company or timber company?

A. From 1933 till 1942 I was logging engineer for Bodell-Donovan, a big operation on the Olympic Peninsula in Washington.

Q. Until when did you say, from '32 to when?

A. From '33 to '42.

Q. Nine years there you were engaged up there?

A. That's right.

Q. What, then, brought you to Oregon, Mr. Gibson?

A. This looked like a more likely country at that time.

Q. Had it begun to cut out up in Washington?

A. That's true.

Q. And had they got into second-growth manufacturing up there to any considerable extent? Do you have any familiarity with it? [302]

A. I don't have too much familiarity with that.

(Testimony of Roy C. Gibson.)

The company I was with had not and it was primarily double——

Q. Where did you go when you came to Oregon?

A. I came to Eugene and went to work for Snellstrom Lumber Company at Vaughn, which is 20 miles west of Eugene here, as an assistant logging superintendent and engineer.

Q. And you remained with them until how long?

A. Remained with them until 1945, when Long-Bell acquired the company, and then I remained with Long-Bell until 1951.

Q. Now, during——

A. A period of nine years.

Q. ——during your first years with them in '41 through '42, particularly, what type of logging was your employer engaged in?

A. Well, they were primarily logging old-growth timber and, principally, a cable-type operation; high-lead logging it was called, although we did do some Cat logging in the summertime in the better ground.

Q. What did the timber stand consist of primarily? Would you describe it just generally? We are interested in showing at this point how it might compare with the timber on the Seaver tract.

A. It was principally an old-growth stand; however, it was characterized as being—having had many burns through it. There were many vacancies or, at least, we called them [303] vacancies then. The second-growth intermingled with the old-growth.

(Testimony of Roy C. Gibson.)

Q. By intermingling, now, could you be more specific? Do you mean tree by tree or——

A. Well, not——

Q. Tract by tract?

A. It's not usually tree by tree. It shouldn't be described as tree by tree, but spots by spots. It's a logging setting, for instance, which might have part of the setting in spots—spots in it of second-growth.

Q. All right. Was there considerable second-growth, then, on the property; is that what I understand you to say? A. Yes, there was.

Q. And hemlock, too?

A. Not much hemlock. It was primarily about 95 per cent fir stand.

Q. Now, would you state whether during those years the company was logging any second-growth timber?

A. Not as a practice. We did log some, yes. We logged some purely—I remember a few instances. But we logged—a percentage of our operation was in second-growth that came with the old-growth due to the nature of the country.

Q. Well, that would be, then, incidental to your logging operation. You take the second-growth that came in with the old-growth, is that correct? [304]

A. That's right.

Q. What use was made of that?

A. It was taken to the mill and sawed.

Q. Sawed into planks or special products, or are you familiar with that?

(Testimony of Roy C. Gibson.)

A. Well, that was sawed into the type of lumber that type of tree would make which is primarily dimension plank and such.

Q. It was not discarded, is that correct?

A. No.

Q. Was it then subsequently marketed?

A. Yes.

Q. The product? A. Yes.

Q. Yes. What is good forestry practice in operating that kind of a stand of timber with respect to clear-cut logging?

A. Well, in operating in that type of a stand in that country it would be an impossibility to log the old-growth only in a good—except in cases where it was purely old-growth. So the only thing you could do was to take the second-growth with the old-growth.

Q. You clear-cut as you went, taking everything that was in a setting, is that right?

A. Not necessarily. Where there was a stand of second-growth that could be economically left, why, we did so in most cases. [305]

Q. That is, if it were exclusively second-growth?

A. Yes.

Q. I am talking about the intermingled stands where you made your setting in an area in which there was both second-growth and old-growth.

A. Then we took it all.

Q. You took it all? A. Yes.

Q. You cleared out the area around the setting, is that right? A. That's right.

(Testimony of Roy C. Gibson.)

Q. Yes. Now, if these were too small to take into the plant, were they burned as slash?

A. Well, we were somewhat careless in those days. Timber wasn't very valuable then; we didn't work it over too much. We left the timber, if that answers your question.

Q. I am talking now about good forestry practices in an area that was cut or a setting that was cut. Did you attempt to leave it clean?

A. There was only one thing to do under good forestry practices, and that was to take everything in.

Q. Or burn what was left? You intended to leave a clear spot, didn't you?

A. That's right.

Q. For reseeding or to eliminate fire hazards and to otherwise [306] make it useful for reforesting? Isn't that what good forestry practice is?

A. That's right.

Mr. Biggs: I think that's all. Oh. Just a minute.

Q. Was there anyone to your knowledge in that area at that time, Mr. Gibson, engaged exclusively in the manufacture of second-growth?

A. I would have to qualify that answer. As I recall, I am certain there were small mills. I couldn't definitely say that I can name one specifically that was operating at that specific time. I feel sure there were.

Q. Well, was Snellstrom, your old employer, at any time in '42 engaged exclusively in second-growth logging?

(Testimony of Roy C. Gibson.)

A. I recall that when I first went there in the spring of '42 they had one side or one part of the operation logging exclusively in second-growth. The reasons for it I don't know. The mill was primarily designed for old-growth, but they were in that case——

Q. Altogether, second-growth that they were bringing into an old-growth mill——

A. That's right. Absolutely.

Q. ——and sawing it up with the big gear that you used for old-growth——

A. (Witness nods head.)

Q. ——operations; is that correct? [307]

A. That is correct.

Q. You say one side. What would a side mean, one——

A. Oh, that's one——

Q. ——or more settings, a series of settings?

A. In this case it was an area of, oh, possibly 40 acres.

Q. Yes.

A. One part of the operation—or one unit of logging operation was logging in that.

Q. I see.

A. And—but the other—but it was in another area.

Q. And Snellstrom was operating two units; one when you first went with him and engaged in second-growth exclusively, and the other in the old-growth?

A. That's right. The one was exclusively in the

(Testimony of Roy C. Gibson.)

old-growth, in the second-growth. The other I don't specifically remember, but it was in the normal operation.

Q. Would you have any idea—I don't want to spend too much time on it—if you recall, about how much timber would have come off of that side, the second-growth side, in the spring or for the entire year of '42 where they're operating second-growth? How long did it take to clean up that stuff?

A. Well, from that 40 it probably ran a mile and a half. Second-growth.

Q. Where was Snellstrom operating with reference to the Seaver tract, if you can tell us? [308]

A. The mill was located 20 miles west of Eugene here on the Willamette side—on the Willamette drainage; however, all the timber came from the Siuslaw drainage.

Q. Oh. The timber was over on the other side of the Cascades but it was brought over east of the Cascades to your mill where——

A. That's right.

Mr. Biggs: That's all. Siuslaw. I said Cascades.

The Witness: Coast Range, yes.

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Gibson, when did you go to work for Snellstrom Lumber Company?

A. In June, I believe, of 1942.

Q. How long did you work for them?

(Testimony of Roy C. Gibson.)

A. They sold out to Long-Bell in 1945 and I was in with Long-Bell.

Q. Now, isn't it a fact, Mr. Gibson, that the Snellstrom Company in 1942 and thereafter avoided, wherever possible, cutting second-growth timber and bringing it to the mill?

A. Yes; I think I could say yes to that. Not quite that strong, but could have. I have just stated that they did log second-growth.

Q. Isn't it a fact that they found in 1942 and thereafter that they could not profitably log the second-growth that they [309] brought in?

Mr. Biggs: I think, if the Court please, I am going to make an objection for the record at this point. We do not concede that profitable characteristic of an operation is any part of merchantability. We think the Court expressly rejected that element.

The Court: Well, I am going to overrule the objection and permit the witness to answer. I excluded this the last time because I wanted to have an unobjectionable question and then I found the witness answered it the same as he would have answered if he had that additional element. So I am going to permit the question now.

Mr. Dezendorf: Would you like the question again?

The Witness: Yes.

(At this point Mr. Dezendorf's last question to the witness was read by the Court Reporter.)

(Testimony of Roy C. Gibson.)

Q. (By Mr. Dezendorf): Isn't it a fact, Mr. Gibson, that Snellstrom found in 1942 and thereafter that they could not profitably cut in their mill second-growth that was brought in at that time?

A. Well, I couldn't positively answer that. Their mill was designed for that type of timber they had which was not second-growth. Whether they knew or whether they lost money on second-growth or made money on it, I don't know. I suspect that they [310] did after the market went up about that time.

The Court: After the market went up? What do you mean?

A. Well, the market was rising then those years.

The Court: And even though they got more money for their lumber you say they discontinued it?

The Witness: No, I didn't say that.

The Court: Well, I didn't understand what you meant by "they probably did because the market was rising." You mean the cost of stumpage was rising?

The Witness: I meant the lumber market.

The Court: I still don't understand. Tell me again what do you mean "the market was rising." The price of wholesale lumber was rising?

The Witness: Yes.

The Court: Well, how could that affect the profitableness of cutting second-growth timber logs?

(Testimony of Roy C. Gibson.)

The Witness: Be more money for the lumber.

The Court: What?

The Witness: Get more money for the lumber, is what I meant.

The Court: I still don't understand.

Mr. Husband: If the Court please, I think he testified that they probably began to get money out of the second-growth in 1945 because the price was rising. I think that's what he said. [311]

The Witness: That's what I meant to say.

The Court: Oh. In '45.

The Witness: '42.

Mr. Husband: From '42 to '45.

The Witness: From '42——

The Court: You start over again.

Mr. Dezendorf: I'd like to. Thank you.

Q. In 1942 and 1943, as I understand your testimony, it was the definite policy of Snellstrom Lumber Company not to take any second-growth if possible; is that correct?

Mr. Biggs: That isn't true. That's a misstatement of the testimony, if the Court please, and I object to it.

The Court: He said in response to an almost identical question that that was putting it a little too strong. But there was a policy wherever they could avoid it to go into old-growth timber.

The Witness: Well, I'd like to state that the mill was designed for the stand that they had, which was primarily old-growth timber.

(Testimony of Roy C. Gibson.)

The Court: We know that. You have already testified to that.

The Witness: That's what they tried to log primarily.

The Court: No. The question that Mr. Dezen-dorf asked you can be answered in the affirmative that generally speaking they did try to avoid second-growth stands. [312]

The Witness: That's right.

The Court: That's right.

Q. (By Mr. Dezen-dorf): You did at that time, did you not, that Snellstrom found out that they could not make money on the second-growth timber that they brought in and put through the mill?

A. Well, I didn't know that. I knew generally there was less profit to that than the old-growth.

Q. But you didn't know it as a fact that they found out that they lost money on the second-growth they brought in? A. No.

Q. And you first came to Oregon in June of 1942? A. That's right.

Mr. Dezen-dorf: That's all.

Mr. Biggs: Maybe I misunderstood your direct testimony.

Redirect Examination

By Mr. Biggs:

Q. I thought you said the company purposely and deliberately was operating a side of second-growth, exclusive operation, in 1942. Did I misunderstand you?

A. No, you did not. That's quite definite. I re-

(Testimony of Roy C. Gibson.)

member that distinctly, that they were operating in second-growth, purely second-growth at that time. But it was this one side.

Q. I see. Well, they didn't avoid that stand, then? [313] A. No.

Q. Was that an exception to what you were saying, that generally they tried to avoid it?

A. Yes, I think that would be about right. They generally tried to avoid it because their mill was designed otherwise.

Mr. Biggs: That's all.

(Witness excused.)

Mr. Biggs: Call Mr. Graham, if you [314] please.

FRANK A. GRAHAM

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

The Court: What is this witness going to tell us?

Mr. Biggs: This witness is a specialist, if the Court please, in the lumber industry in Lane County for many years. He is a distinguished man in the field. He will testify what the retail market was for second-growth operations from 1928 almost to the present time. I anticipate that's what his testimony will be.

The Court: I thought you were objecting to the profitableness of the operation as a test?

Mr. Biggs: I am, your Honor. I am. I am only attempting to show since the—it's been made that

(Testimony of Frank A. Graham.)

there was a demand for it. Now I think whether or not these people were making money or losing money by it in a particular instance is unimportant. If there was a market for second-growth timber, then, even by the most technical definition that Counsel is using of merchantability, this was merchantable. We say this is only a subsidiary position to our main position that the intention of the parties is controlling, in any event, your Honor. But, if there is any question about whether second-growth was marketable or merchantable, then we are prepared to show that it was extensively used.

The Court: All right. Go ahead. [315]

Direct Examination

By Mr. Biggs:

Q. Your name is Frank Graham and you live in Lane County, Oregon?

A. That's right.

Q. How long have you lived in Lane County, Mr. Graham?

A. Since August, 1924.

Q. August what?

A. 1924.

Q. What is your occupation?

A. Well, I am a partner in a lumber operation at Jasper, California, the Hills Creek Lumber Company.

The Court: Which lumber company?

The Witness: Hills Creek.

The Court: Hills Creek.

Mr. Biggs: Throw your voice out a little bit.

(Testimony of Frank A. Graham.)

We get street noises through the windows here and it's a little——

Q. How long have you been engaged in that business?

A. I came to Eugene at that time and accepted jobs as an accountant with a combination wholesale and manufacturing lumber concern.

Q. Have you been actively engaged in a similar business since that time, Mr. Graham?

A. Ever since.

Q. Yes. What professional association activities have you [316] engaged in during these years?

A. Do you want all of them?

Q. Oh, we don't want you to overdo it, but so that the Court will have some idea about your experience and extent of it.

A. I served on the Board of Directors and as an officer, Treasurer, Vice-President and President of Willamette Valley Lumbermen's Association. That probably covered a period of ten years. I was also on the Board of Directors of many special committees of the West Coast Lumbermen's Association and was Treasurer of that organization for six years. At one time I was a member of the Board of Directors of the National Lumber and Manufacturers Association.

Q. Yes. What are those professional associations engaged in?

A. Well, of course, the National Lumber Manufacturers Association involves all producing species of lumber in the United States.

(Testimony of Frank A. Graham.)

Q. Well, in that connection and in connection with the operation of your own business and in your experiences during these years in Lane County, are you familiar with what uses—commercial uses have been made and the extent of such use of second-growth fir timber in this area?

A. Well, I do have such familiarity.

Q. Will you just describe to the Court in your own words [317] what those conditions were with particular reference to the year 1942 and the period immediately preceding that?

A. Well, it's going to be very difficult to cover these questions specifically and pointedly because there are so many other matters that affect these questions that I am going to ask your Honor to enlarge upon them.

Q. We are turning you loose and then people can stop you.

A. You have to bear in mind that up until 1936 or '37 every mill in this country starved to death.

Q. Started what? A. Starved.

Q. Starved.

A. Even the largest—one of the largest mills in this county didn't make a profit until about 1940—'40, I would say.

Q. Yes.

A. And when you are talking about the relative situations about whether you're going to cut a second-growth tree or an old-growth tree, they are relative as far as I am concerned because it all depends on the market situation.

(Testimony of Frank A. Graham.)

Shall I go on? Am I bothering you?

The Court: You are not bothering me. I have to be here until 5:00 o'clock anyway.

The Witness: The witness just ahead of me who was a logger and an engineer was asked a question about whether or [218] not a mill made a profit on selling second-growth. Well, that was a tough question for him. The answer to that thing would be this: With the market available for that second-growth log, he could make more money on it than he could on some of the old-growth he was cutting. Carshell—42-foot carshell—and they were at that time for the Pacific Express Company—I happen to remember the people that bought that type of timber—and the price on that particular item would be twice what a plank was, such as the former man testified—as the mill man.

Mr. Biggs: Mr. Phelps.

Mr. Dezendorf: I think I am going to have to ask that questions be asked so that we can speed this along and protect our record.

The Court: Let him answer the question. You do the best you can and we will give you some latitude.

Q. (By Mr. Biggs): What was the utilization in terms of specific end products being made of second-growth in 1942 and the year preceding—immediately preceding that, if you can answer the question?

A. Well, you can frame an entire house with second-growth lumber and it's probably just as good

(Testimony of Frank A. Graham.)

or better than old-growth if it's handled properly. The structural strength of that particular piece of wood is just as good; the grade is better.

Q. Was it being used, in fact, for construction of houses [219] in 1941 and '2 and the years preceding? A. In considerable quantity.

Q. What other end products, then, Mr. Graham?

A. Well, I mentioned this one special item that goes in the framework of a refrigerator car which is 42 to 44 feet long.

Q. You are speaking now of specialized products? A. That would be——

Q. That would be even more valuable than old-growth timber, is that correct?

A. That's right.

Q. All right. Let's keep to that category. Are there any more of those specialized types of products that have an unusual value for such growth?

A. Well, of course, you take a—as long as you get enough density in a second-growth log you can make crossarms out of them—that's the arm that goes across the light poles and telephone poles, and that sort of thing—which is also in a special category and brings a very fine price. Now, it does have a ring specification, that item.

The Court: Let me try some other questions on you. What did your mill do? You were the president of a lumber company.

The Witness: No, I was—well, I am in a partnership, so I am not a president. [320]

The Court: You are in a partnership.

(Testimony of Frank A. Graham.)

The Witness: And General Manager of that particular partnership now.

The Court: What was the name of the company?

The Witness: Hills Creek Lumber Company.

The Court: Oh.

The Witness: Now, the original company—I have been with two companies. My original company was the Lewis Peters Lumber Company, who officed in this town, and they were in a combination business of wholesaling and manufacturing.

The Court: All right. Now, in 1938 and '39 and '40 and '41 and '42 what business were you in?

The Witness: Well, I was——

Mr. Biggs: Answer generally. Just tell him——

The Witness: I left this original concern—I have been with two concerns in my own private business. I was a stockholder in this first firm when I left there in 1938 in May and then I became a general partner with the Hills Creek Lumber Company at that time, and I have been with them ever since.

The Court: All right. We will start in 1938. What did the Hills Creek Lumber Company do?

The Witness: What do they do? They have a little sawmill that cuts about three boxcars of lumber a day; in other words about a 75,000-capacity mill. [321]

The Court: What kind of logs were they cutting?

The Witness: We were in the Hills Creek basin

(Testimony of Frank A. Graham.)

and one of the finest old-growth stands of virgin timber.

The Court: Yes. Was there any second-growth at that time? Were you cutting any second-growth?

The Witness: Only in such spots as Mr. Gibson described. If it was in a bush or someplace, there might be a minor percentage of second-growth in that area.

The Court: Well, in connection with your trade association did you know the market for second-growth?

The Witness: Oh, yes.

The Court: Now, were you also wholesaling lumber?

The Witness: Not in those years.

The Court: What years were you wholesaling?

The Witness: The last wholesale experience I had was, possibly, in 1934.

The Court: Well, can you tell us what the market for second-growth was in 1940 and '41?

The Witness: Well, that was a very broad market, sir, your Honor, because at that time lumber was becoming not necessarily scarce but there was not enough production of lumber to care for the wants of the trade, the demand. And that was because of the scarcity of manpower and money and those things, which we all know.

The Court: In '40 and '41? [322]

The Witness: That's right. In '41 the Government started to procure lumber for the—in '40 they started to procure lumber and that was the time

(Testimony of Frank A. Graham.)

that the influx in the demand began to become prevalent enough to bring the price of wood up.

The Court: What was old-growth selling for on the stump in 19——

The Witness: You are talking about stumpage now?

The Court: Yes.

The Witness: Well, specifically, we bought a very fine section of timber, I believe, in the year 1940 from the Booth-Kelly Lumber Corporation for \$1.75 a thousand, on which we—on our estimate of cruise. Now, it was a flat price.

The Court: And was it accessible timber, close to a road?

The Witness: It was adjacent to our logging area. And we were right in the area and we were right up against it.

The Court: All right. What was second-growth selling for, if you know, during that same period?

The Witness: Well, I would guess that second-growth was probably——

The Court: Well, I don't know what——

The Witness: Well, I have to guess because I wasn't buying any. And all I would know——

Mr. Biggs: If you don't know, just say so, Mr. Graham. [323]

The Court: So you don't know what they were paying for the lumber?

The Witness: No—now, wait a minute. Lumber and stump——

The Court: I mean the stumpage.

(Testimony of Frank A. Graham.)

The Witness: Lumber and stumpage is two different things.

The Court: You don't know what they were paying for stumpage?

The Witness: No, I do not.

The Court: Do you know how great the demand for second-growth lumber was during the years 1940 and '41?

The Witness: Well, now, there is a great distinction between those two years. '40 was the year that the United States Engineers started procuring lumber for the defense purposes. And from that time on the demand kept getting stouter and stouter and the production, if anything, lower because of the lack of manpower. And——

Q. (By Mr. Biggs): Was it good in '41? I think that would help.

A. It was much better in '41 than it was in '40.

The Court: And how about in '42?

The Witness: Still better. But, now, there is something. If I may go on, here is a point that hasn't been brought out: Prices were set, if you remember, about that time. So, unless you were cheating, why, everybody got the same kind of a price [324] for the commodity.

The Court: For second-growth and old-growth?

The Witness: It didn't make any difference whether it was second-growth or old-growth.

Q. (By Mr. Biggs): So that second-growth from '41 and '42 on, the retail market was just as good as the old-growth retail market?

(Testimony of Frank A. Graham.)

A. Definitely.

Mr. Biggs: Yes. I wondered if the Court would bear with me to develop a little more widely these end products. We were talking about specialized products, and then you were talking about siding.

Q. Now, what is dimension lumber? Was there any particular market for second-growth dimension lumber?

A. That would be the item that I was talking about. Because when a retail yard wants to buy a carload of 2 by 4 16's and they're scarce, why, they will kiss you to have the second-growth just as quick as they would the old-growth.

Now, there are some things wrong with second-growth but, then, there is nothing wrong with it when lumber is scarce than when there is a market for it.

Q. Yes. Do you know of any sawmills in Lane County that were exclusively engaged in the manufacture of second-growth lumber in '40, '41, '42?

A. I know of them. [325]

Q. I know that. I don't mean—I know you weren't engaged in them. But do you know mills that were doing that, Mr. Graham?

A. Yes, sir.

Q. Will you name them, as many as you can think of right offhand? A. In Lane County?

Q. Yes, sir.

A. Well, in this town—now, what was the year again, sir?

(Testimony of Frank A. Graham.)

Q. Well, let's take '42 if you can confine it right to '42. But '41 would be acceptable, or '40.

A. We didn't have very many sawmills in Eugene at that time. I think at one—probably about the turn of the '40's there were probably about five sawmills in this town and it later got——

The Court: He didn't ask for Eugene.

Mr. Biggs: I said Lane County, sir. If you could name some in Eugene and go to other areas, do it, but——

The Witness: That's almost—excuse me.

Q. (By Mr. Biggs): Well, were there lots of them or just a few? A. There were——

Q. Could you say that?

A. There were——

Q. A lot of them? [326]

A. There were.

Q. Could you name a few specifically?

A. Well, the ONeil Lumber Company, in Eugene, the Lane-Gatcher, I believe, was the name. There were two Lane-Gatcher mills. Walters-Bouchon operated in this town.

The Court: And these were using second-growth?

The Witness: They were using any log they could get. And, of course, second-growth was about all they could get.

Mr. Biggs: All right.

Q. Potters? Do you know a Potters?

A. Well, Potters operated in second-growth through generations, the father and then the sons. I can't tell you what year. They probably cut out

(Testimony of Frank A. Graham.)

over in the Coburg hills about that time, somewhere around the late 30's or early 40's. And they moved, then, and I don't know what the Potter Brothers cut at Walker.

Q. Do you know a Matlock? Archie Matlock?

A. Yes.

Q. What was he operating?

A. Well, Matlock—and I heard another name mentioned, Roy Swensen—his previous operations were at Siuslaw, had been in Toledo. A man by the name of Krohn and a man by the name of Christenson all were second-growth operators. Some of them lasted until the war years, and some of them didn't.

Q. You mean cut out before the war years? [327]

A. Either cut out or went out of business.

Q. We would like to have them as nearly as possible in the 1942 era. What about a Pat Dunning? Do you know him?

A. Yes. But that goes farther back, sir.

Q. Oh. He had cut out before 19——

A. Yes.

Q. ——41? Did the situation change, then, materially except as the market fluctuated up and down as to the desirability of second-growth lumber from 1928 until 1941 or '2?

A. Well, I hate to be—to talk too much to answer a question, but I have to give you a comparison. It's the same thing as in the automobile industry today. The Chrysler people probably can't sell as many cars as they want to because the market slowed up on them. The same thing is true of the

(Testimony of Frank A. Graham.)

2 by 3 by 8's, and to the 2 by 4 by 8's, the market was not very good. In fact, many mills were down because of that.

Q. Following your analogy, has there been continuously a demand for second-growth timber subject to market fluctuations from 1928 to 1945 or beyond as there has been for automobiles?

A. I would have to answer that yes. I have never known of a time that you couldn't sell second-growth lumber.

Mr. Biggs: That's all.

The Court: Wait a minute.

Q. (By Mr. Biggs): Well, I will ask you, have you bought and sold a lot of second-growth lumber now while you have been in [328] the wholesale business?

A. Well, I will have to explain that. I was an accountant with this wholesaling concern until about 1930, when I was moved up to the sales desk. And from that time on for two or three years I did trade in that type of lumber.

Q. Nineteen when, '38?

A. From '30 to '34.

Q. '30 to '34?

A. And after that time I was not in the wholesale lumber business.

Mr. Biggs: All right. That's all, Mr. Dezendorf.

Mr. Dezendorf: Could we have just a minute?

The Court: All right.

Mr. Dezendorf: No questions.

The Court: That's all.

Mr. Biggs: That's all.

(Witness excused.)

Mr. Biggs: Are you going to really work right on through to 5:00 o'clock?

The Court: Do you want another recess or something?

Mr. Biggs: Well, I was just thinking—I thought maybe five minutes now would save a little bit more time if I could have just that to reorganize these witnesses. They have gone a little bit faster than I anticipated.

(Recess taken.) [329]

Mr. Biggs: Call Mr. McPherson.

The Court: Mr. McPherson.

FRANK W. McPHERSON,
produced as a witness in behalf of the Defendant,
being first duly sworn by the Clerk, was examined
and testified as follows:

Direct Examination

By Mr. Biggs:

Q. What is your residence and occupation, Mr. McPherson?

A. I am a resident of Gold Beach, Oregon. And I am a Resident Manager for United States Plywood's operation at Gold Beach.

Q. Were you at one time associated or employed by Siuslaw Forest Products Company?

A. Yes, I was.

(Testimony of Frank W. McPherson.)

Q. When did you become employed by them, Mr. McPherson?

A. I first became employed by Siuslaw Forest Products in March, 1946. And I was employed by Siuslaw Forest Products until the change of company's name, the ownership, in approximately 1953, I believe it was, when it became United States Plywood. And I was with that organization until December of 1955 when I moved to Gold Beach.

Q. As I understand it—you know you can say so if you don't [330]—do you know what the details were of the acquisition by U. S. Plywood of Siuslaw Forest Products?

A. I didn't get the question, sir.

Q. Do you know the details of the acquisition, how that was acquired or when it was acquired?

The Court: Is there any issue on that?

Mr. Biggs: I don't think so. Is it clear in the record? I will state it through this witness. He can correct it.

Q. U. S. Plywood purchased 52 per cent of the stock of Siuslaw Forest Products before you went to work for them, isn't that correct? They were the majority stockholders, were they not?

A. That's right.

Q. In 1952 all the assets were transferred to U. S. Plywood and Siuslaw Forest Products was dissolved; is that correct?

A. That is correct.

Q. At that time, then, all of the holdings became

(Testimony of Frank W. McPherson.)

U. S. Plywood holdings April 1st, I believe, in 1958, is that correct? May 1st, 1953.

A. I believe that's correct. That's the correct date.

Q. All right. What capacity did you go to work for Siuslaw Forest Products in?

A. I first went to Siuslaw Forest Products in May—correction—March of 1946. I went there as a sort of an engineer to locate and build and construct roads and run property lines and things of that nature in the woods operation. [331]

Q. What technical training or academic training have you had, Mr. McPherson?

A. I was a graduate of Oregon State College in Forestry.

Q. Forestry? A. Yes, sir.

Q. Yes, sir. Prior to that time had you had any woods experience in Oregon?

A. Yes, I had.

Q. What did that consist of?

A. Well, back in the years 1933 to '35 I worked in the logging operation in Clatsop County at the—working in general activity work. After I graduated from school in 1939 I worked up in Washington out east of Seattle on the Snoqualmie area for North Bend Timber Company there and also up on the Skagit for the same company until I went into the service in 19—I will—it was the tail end of 1941.

Q. Yes. During the years that you were in Oregon and before you went into the Army were you familiar with the fir logging in the fir timber area?

(Testimony of Frank W. McPherson.)

A. That's what I was employed at back in the 30's.

Q. In the '30's was there, to your knowledge, any logging of second-growth timber and manufacture of second-growth timber?

A. There was some, yes.

Q. Do you know specific mills that were engaged in that [332] business at that time?

A. My knowledge of it at that time would be so I'd have to answer it No.

Q. In the companies that you were associated with and working for then was the cutting of second-growth simply a part of the old-growth operation—logging operation?

A. That is right. Strictly a logging operation.

Q. Strictly a logging operation. Now, when you went to work for Siuslaw do you know who the manager was at that time?

A. Manager at that time was J. D. McCann.

Q. How long did he remain manager of the company?

A. To be exact I couldn't say, but he was there for a year or so and left to go up into Washington for our same company and also acted as the manager for the Mapleton operation.

Q. Who succeeded him, Mr. McPherson?

A. Mr. E. W. Holmes.

Q. How long was he manager?

A. For a year or so.

Q. Then who succeeded him?

A. Mr. Stevens.

(Testimony of Frank W. McPherson.)

Q. How long was he there?

A. Wallace Stevens. Wallace Stevens came there in, I believe it was, about 1949.

Q. Then there has been a succession of managers within the four or five years after you joined the company, is that correct? [333]

A. That is right.

Q. What new or additional responsibilities were imposed upon you as a result of that succession of managers?

A. Well, when I first started working in the woods I was doing the details that I originally stated, and, as time went on, I was gradually—gradually took over on—was assigned additional duties.

I was for a while the only—practically the only woods employee on the—I mean, that supervised employees on company's woods staff.

Q. Well, how would Siuslaw log, by its own employees or through gyppo contractors, when you went to work for them?

A. They were changing over at the time I went there from company logging to all contract.

Q. What was your responsibility in that? Did you have anything to do with the negotiating with the gyppo contractor?

A. Right at that time, no.

Q. Well, did you assume that responsibility sometime later on? A. Gradually, yes.

Q. Then as a woods supervisor what did you do? You tell us.

(Testimony of Frank W. McPherson.)

A. Well, what years would you like to make?

Q. Starting, we will say, in '45.

The Court: What is the purpose of all this?

Mr. Biggs: I just want—several things. I wanted to [334] show how his responsibilities multiplied, even taking over some of the bookkeeping. But I wanted, then, to show his construction of the road work and the—how the tract was actually logged.

The Witness: I might make it quite brief, if I can.

Mr. Biggs: Sure you can.

The Witness: Your Honor——

The Court: That suits me fine.

The Witness: My original assignment was principally in the engineering of the road systems and developing of roads, construction of roads, as well as running down to the property lines. And that was primarily what I done the first year that I was employed at Siuslaw Forest Products.

Q. (By Mr. Biggs): Were you in charge of the construction of the road into the Seaver tract?

A. That is right.

Q. That was completed in about the fall of 1949, according to this map. I am leading just a little bit. Is that correct?

A. That is correct. The road is constructed——

Q. Then tell us what your logging was in so far as it affected the Seaver tract in 1949?

A. We had—in '49 we probably had about four or five contract loggers working for us. And, as I recall, they were two loggers working in that gen-

(Testimony of Frank W. McPherson.)

eral area, one down in the—what we term the Jump Creek area which, I believe, has been already [335] defined, which is just——

Mr. Biggs: Come over to the map. Just point out, then, if you will, where your first operation was on the Seaver tract.

A. Well, the first operation on the Seaver tract which is shown here in red was when we logged this area in green, which was part of the other—another timber purchase acquirement.

Q. You are talking about an area immediately to the north of the Seaver tract?

A. Immediately to the north and west.

Q. Oh. I see.

A. The topography of that area is such that there is a ridge running approximately through the tract. And in conjunction with logging the timber to the north we also logged the—approximately the north half of that fork.

Q. Yes. All right. Then what was the next show in the logging show in the Seaver tract? When did that start?

A. The next show started in the year 1950. And we progressed the road on down into the Seaver tract and down someplace approaching this township line down—it's shown right here as the fall of '50 (indicating). It was down in this general area.

Q. About where the arrow is marked there "1950"? A. Approximately.

(Testimony of Frank W. McPherson.)

Q. All right. [336]

A. We logged in the same 40 that we had logged the previous year. We came on down.

Q. Taking the south side of it?

A. Taking the south side of it.

Q. All right.

A. Logged along the road—the main road. We projected another road into the draw leading generally easterly through the—generally central part of the Seaver tract and went up the long draw—first long draw to the north which was about two 40's deep or a half a mile long.

Q. I am interested in that draw. That draw was on the east side of a ridge there, was it, running north and south—generally north and south?

A. There was a ridge off here (indicating) to the east of that canyon. It was a series of draws and ridges in that area.

Q. And was your logging in there heavy during the year of 1950? A. Fairly heavy.

Q. Yes.

A. We also logged—I think the road was probably a little further because we came down here and logged in this area (indicating).

Q. Yes.

A. And also in the south of the township line in this area in Section 6, Township South—this is a township line (indicating).

Q. Then in 1951 was there any logging at all on the Seaver tract?

A. There was a small amount of logging in 1951.

(Testimony of Frank W. McPherson.)

Q. Where was it?

A. In the easterly edge of this first 40 that we had touched. I might add that when we logged the north side of the 40 and also when we logged the southerly side we were in there with large yarders, large equipment, and—which was naturally adaptable to the general type of the timber which was predominantly larger timber.

There was a small pocket on this side (indicating) which was left and was logged in the year 1951.

Q. What were the logging season dates, now, for '50? I should have asked you that.

A. We pulled out of this (indicating) tract in the late summer of '50 and moved our operation over into the upper Knowles Creek area to log in what we termed South Canyon Creek——

Q. All right.

A. ——for the winter. We were down there on a—that was a summer road at that time, dirt road.

Q. Now, you have showed us what you did in 1950. What did you do in 1952?

A. I don't know just what—— [338]

Q. On the Seaver tract, I am talking about.

A. On the Seaver tract?

Q. Yes.

A. In the—if I could explain that just a bit by saying that in the winter, December of 1951, there was a terrific windstorm all up and down the Coast and it created a blowdown. And we found that areas down in the Seaver tract had received a considerable amount of blowdown and that in order to

(Testimony of Frank W. McPherson.)

salvage that timber and reduce the fire hazard we went in and started logging some of that timber. We logged some along here (indicating) and some over in there (indicating). We fell and bucked timber and piled the timber. Some of it was hauled in. But right at this time I couldn't say how much was.

Q. Most of the timber on the Seaver place in 1952 that was felled was cold-decked on the tract and hauled into the mill the subsequent year, is that correct? A. That is right.

Q. All right. Now, 1943, was there logging then, too?

A. That is right. We done other logging in that area in 1952.

Q. Well, I am interested primarily in the Seaver tract.

A. Yes. In 1953, then, we went in and picked up those logs that were decked and also logged this tract that was——

Q. Now, indicating the southeasterly 40 there of the Seaver [339] tract, is that correct?

A. That is correct. And the tract over here in Section 1 of the other township and range and started some logging in this area here (indicating).

Q. All right. A. In the most——

Q. Now, 1954 I think it's been suggested that there was a little logging there because of the loggers' strike.

A. We had an operation that started in there

(Testimony of Frank W. McPherson.)

in '53 and intended to take it out in the year—finish it in '54, but the strike took place, I believe, from May through the entire summer, and they didn't get it all out. They had to go back in 1954.

Q. Then in '55 what logging was done?

A. Well, they didn't finish it all. '54 was the year of the strike?

Q. Yes.

A. They didn't finish it all in '54. They came back and finished up what was left in the spring of '55 and that was—there was only a small amount in the spring of '55.

Q. Yes. Then what area did Mr. Seaver log for you and in what year, Mr. McPherson?

A. That I do not know.

Q. Oh. You didn't—

A. That was after I left the operation. [340]

Q. Oh. You left the operation when?

A. '55.

Q. Oh. In 1955. You had nothing to do with the negotiation of the contract with Mr. Seaver?

A. None whatsoever.

Q. Now, if you will just take the stand again—no. Just wait there for one minute. Well, take a seat. In addition to your supervision of your logging activities what office responsibilities did you have during those years?

A. The timber records as they were, tax payments on the timberlands.

(Testimony of Frank W. McPherson.)

Q. What were the timber records, then, that you found when you came to Siuslaw?

A. Well, I found very little when I first—the first year that I was confronted with the task of supplying a cutting record for the previous year. I had very little information on record.

Q. Was there any complete record of the company's holdings supported by accurate data as to the extent of the timber thereon?

A. No, sir. There was a summary showing the timber by tracts and total acreages and a volume for those tracts, but no——

Q. There has been introduced in evidence here a record known as a timber depletion record. Did you set that up, [341] Mr. McPherson?

A. Yes, I did.

Q. In one column under the heading "Volume" are a series of figures by 40's. What did that volume represent?

A. Well, for the most part it represented information that came off of cruise sheets that were available.

Q. Now, that meant the initial inventory or the inventory that you thought the company had when you took it over, is that right?

A. For tracts that hadn't been logged on that cruise information would be the inventory information.

Q. Did you have cruise information for all of it?

(Testimony of Frank W. McPherson.)

A. No, I did not. I was unable to find cruise information for several tracts.

Q. Well, as to areas for which you did not have cruise information how did you supply the data for your initial inventory?

A. I used what information I could find, no matter from what source.

Q. Did you have a cruise made of any of that area? A. None whatever.

Q. Well, then, would you say it was just your best estimate based on such information as was available to you?

A. That would be about it, yes.

Q. And did logging activities in the following years bear [342] out errors in your initial inventory? A. Yes, they did.

Q. In a logging company operation state whether or not you anticipated an overrun or an underrun even on a cruise volume.

Mr. Dezendorf: I would object to that for the reason and upon the ground that I don't see that it has any bearing on any issue involved in this case.

Mr. Biggs: Some question has been made of it from time to time. I don't know that it has been, but inasmuch as they are in evidence I wanted to explain how they were compiled.

The Court: Well, I am going to overrule the objection. I know the answer, anyway, but it's all right. You can put it in. After hearing all these

(Testimony of Frank W. McPherson.)

high-priced experts over a period of weeks I know all the answers.

The Witness: Would you repeat the question?

Q. (By Mr. Biggs): I will ask if there was an overcut or an undercut normally on these cruise——

A. We normally had an overcut.

Q. As you entered on your depletion record, then, the actual count of logs as it was taken off—as they were taken off of a tract, how would you account for the overrun if the logs that had come off equaled or exceeded the initial amount of your inventory? How did you treat it?

A. Well, we actually didn't apply the timber removed to the individual areas. So on the depletion record whenever we [343] removed as much timber as that tract showed we—our normal procedure was to deplete the cruise for each on that particular tract.

Q. Now, Mr. McPherson, did it become your responsibility to watch out for the taxes, to pay the taxes, or did you pay taxes?

A. That is right. Yes, we did.

Q. In that connection did you file certain logged-off affidavits, logging affidavits?

A. Yes, we did.

The Court: You say, "Yes, we did."

Mr. Biggs: Yes.

The Court: Who do you mean "we"?

The Witness: The company did. I filed them.

(Testimony of Frank W. McPherson.)

The Court: You filed them on behalf of the company?

The Witness: Yes, sir.

The Court: You prepared them?

The Witness: At this particular time, yes, sir.

Q. (By Mr. Biggs): Those have been introduced into evidence. And I think the effect of them—at least, the first ones—was that by the year of 1951—by the end of the logging season of 1950 you had logged off all of the timber on the Seaver tract in Section 31, at least, excluding Section 1 and Section 6. Is it the fact that you had logged off all that timber when you filed those affidavits, Mr. McPherson? [344]

Mr. Dezendorf: Just a moment. I will object to that for the reason and upon the ground that it is not proper for this witness to try to explain away the sworn affidavits. We refer to the Hughes vs. Heppner case and also to the more recent case which is in the Advance Sheets, which was decided last month. Bear with me a moment and I will find it.

The Court: I know the section that you are going to read. I read them.

Mr. Dezendorf: I am not going to read the section. It is Kergil v. Central Oregon Fir Supply Co., 66 Ore. Advance Sheets, 651. And I believe under the doctrine of that case it would not be proper for this witness or any other witness to try to explain away the sworn affidavit.

(Testimony of Frank W. McPherson.)

The Court: Objection overruled. This man is not the president of the company.

Mr. Biggs: No. Answer it.

The Witness: Would you repeat the question again, please?

Q. (By Mr. Biggs): The question was had you in fact logged off all of the timber on the Seaver tract by the end of the logging season in 1950?

A. More timber had been removed than we had on our depletion records, our timber records.

Q. Well, what I am asking is had it been removed from the land or did you know whether it then had or not? [345]

A. The volume that we had shown on our records had been removed. And I assumed from the information I had that the tract had been logged.

Q. That is based on your timber depletion records?

A. Timber depletion records and the information available to me.

Q. Yes. Did you then actually know of pockets of timber containing a considerable amount of timber logged in 1952 and '53 in Section 31 that had not been logged off in 1950? A. No, sir.

Q. When did you discover those pockets of timber, Mr. McPherson?

A. The winter of '51 we logged this one tract.

Q. You can come down here to the map and show, if you want to do that.

A. We found that we had left this pocket on

(Testimony of Frank W. McPherson.)

here (indicating) where we had actually shown the depletion for it—that 40 in 1951.

Q. Now, you are indicating by that 40 the most northerly 40?

A. Northerly 40. That, as I indicated earlier, was logged in 1951. Then our attention was drawn after the windstorm in 1951 to this blowdown on some of this little fringe of timber in this area and along——

Q. On the east side of the road in Section 31?

A. And on the south of the creek, at least, going through [346] the east and west through the area. And when we investigated those blowdowns we found that there was timber still remaining——

Q. Yes.

A. ——which we then went ahead and logged. And as we progressed we had to run the property lines on the back side. And we found that there was considerable timber left on the south half of the southwest quarter of 31.

Q. And had those been areas which had been covered by your logging affidavits as having been logged?

A. Having been logged.

Q. Now, take the stand. You were not either an officer or director of the company, were you, Mr. McPherson?

A. No, sir.

Q. Were you acting on the best information that you had at the time in filing the affidavits?

A. Yes, I was.

Q. Did you intend to abandon, relinquish, con-

(Testimony of Frank W. McPherson.)

vey, or otherwise surrender any of the company's rights to any timber that was still on that land by the filing of those affidavits?

Mr. Dezendorf: I object to that for the reason and upon the ground that that calls for a conclusion of law. The actions of the company and their man in filing the affidavits in connection with the contract are what are important and not what this individual, who may now say he had any authority of any kind for the company, may have had in his mind. [347]

The Court: I don't think it's important. Even if he had the intention, he couldn't have abandoned it. But I will let him answer because I am letting all the witnesses answer.

Mr. Biggs: Yes.

Q. Will you answer?

The Court: But I won't place very much credence in that statement.

Mr. Biggs: All right.

The Witness: The answer is: No, sir, I did not intend to abandon any timber.

Q. (By Mr. Biggs): Now, were you responsible for laying out the logging plan each year and directing the areas in which the timber was to be cut? A. Yes.

The Court: It is ten minutes after five now. Obviously this witness is going to be subjected to a fairly long cross-examination.

Mr. Biggs: Yes.

The Court: I think probably it would be a good time to ask Mr. Warlick to come back to permit

Mr. Dezendorf to interrogate him. So will you step down? Mr. Warlick, take the stand.

(Witness temporarily excused.) [348]

MARVIN T. WARLICK

recalled as a witness in behalf of the Defendant, having been previously sworn, was examined and testified further as follows:

Mr. Dezendorf: In that connection your Honor, I have asked the Reporter to transcribe for me at his earliest convenience the questions and answers put to Mr. Warlick ahead of the objection that prompted the conference in chambers which is in dispute. I don't have that available for me. From my standpoint it would be better if that could be done in the morning after the transcript has been made.

The Court: Are you intending to be here tomorrow?

The Witness: Judge, I can be here, sir, if you want me.

The Court: Well, you work for the State of Oregon?

The Witness: I have to go back.

The Court: Fine.

(At this point there was a discussion between the Reporter and the Court.)

The Court: Sometime right before 10:00 o'clock you will be on the stand. So you can go home and vote if you want to.

All right. Now, what about this schedule? How many more witnesses do you have?

Mr. Biggs: I think very few, your Honor. There is a lot more detail that we could go into, but I suspect that we have covered the main issues. And Mr. Sanders could finish [349] up rather shortly. There is a great deal of technical information he has which I had anticipated would be in dispute. But it hasn't become an issue yet. I would want the right to use him on rebuttal, depending on Counsel's showing—or surrebuttal. So I think we can finish up, probably within an hour easily tomorrow, your Honor.

Mr. Dezendorf: May I inquire, are you going to call Mr. Fox?

Mr. Biggs: I think not.

Mr. Dezendorf: Well, will he be available tomorrow?

Mr. Biggs: He certainly will. He has been here at all times.

The Court: Is Mr. Fox connected with the company?

Mr. Biggs: Mr. Fox, yes, is also a company employee and was working with Siuslaw during that time. But his testimony would be quite largely cumulative.

Mr. Dezendorf: Actually, we can use his deposition if it isn't convenient for him to stay.

Mr. Biggs: He is going to be here if you want him on the stand, Mr. Dezendorf, for any particular purpose. I am perfectly willing to put him on

for my witness so you can have the benefit of cross-examination.

Mr. Dezendorf: I was just asking if he would be here.

Mr. Biggs: He will be here.

The Court: Do you think you will be through by noon? [350]

Mr. Biggs: He will be through in an hour. How much more testimony will you have?

Mr. Dezendorf: Well, there is quite a little that will have to either come from Mr. Fox's deposition or from his testimony. I would think that we would take at least two, maybe three hours.

The Court: All right. That's fine. We will start in at 9:00 o'clock, then. We will recess until 9:00 o'clock tomorrow morning.

(At this point the Court adjourned at 5:30 p.m.)

Morning Session

(Court reconvened at 9:00 o'clock a.m. on May 16, 1958, pursuant to adjournment, and further proceedings herein were had as follows:)

The Court: Go ahead.

Mr. Dezendorf: If the Court please, I would like at this time to hand to Mr. Biggs the original of the Forest Service records which are noted in the pretrial order which, at the Forest Service's request, we have photostated because they do not wish the original records to be either marked, if

possible, or be a part of the record because they feel that they are permanent records.

The Court: All right. Any objection?

Mr. Biggs: Not at all. These have been admitted, have they not?

Mr. Dezendorf: No. You see, they were subpoenaed here, and then when we got them here they wanted those.

The Court: The originals are admitted. It is stipulated that the originals may be withdrawn and photocopies admitted and marked in their place?

Mr. Biggs: No objection.

(At this point copies of documents entitled "Timber Sale Record Card" or "Timber Sale Record" were marked for Identification as Plaintiff's Exhibit 32-A.) [352]

(Documents entitled "Report of Timber Cut" were marked for Identification as Plaintiff's Exhibit 32-B for Identification.)

(Plaintiff's Exhibit 32-A and Plaintiff's Exhibit 32-B were then received in evidence.)

Mr. Biggs: Are we ready to proceed, your Honor?

The Court: Yes.

Mr. Biggs: Mr. McPherson, take the stand.

The Court: Where is Mr. Warlick? Isn't he supposed to be here?

Mr. Biggs: I understood he was coming here.

He said he would be here. I wonder if he understood—no. You made it very specific it was 9:00 o'clock. I haven't seen him since the Court recessed, your Honor.

The Court: All right.

(At this point Mr. McPherson, the witness, resumed the witness stand and testified as follows:)

FRANK W. McPHERSON

Direct Examination

By Mr. Biggs:

Q. I think I had asked you, Mr. McPherson, whether you were—when you were logging the Seaver tract you in good faith believed that all of the timber you were taking off that tract was in fact timber belonging to U. S. Plywood. [353]

A. That is correct.

Q. Now, you spoke briefly yesterday about the time and the places that you logged on the Seaver tract. It was not a continuous operation, according to your testimony, from the time you started in there until you completed the logging on the Seaver tract; is that correct?

A. That is right. Day by day. It was not continuous.

Q. Why was the logging interrupted from time to time on the Seaver tract?

A. Well, there were several reasons: One reason would be the road situation in which the last

(Testimony of Frank W. McPherson.)

portion of the road into that area was a summer-type road, it was not hard-surfaced so you could not operate on it during the late winter months; and, also, the fact that that area as well as other areas were logged in accordance with the requirements of our milling operations.

Q. Yes.

A. We supplied logs for a plywood plant and a sawmill and——

Q. Now, was that the logs that you were supplying for the plywood plant—I mean, just what type of logs were they? What did you call them?

A. Peeler-grade logs.

Q. What is a peeler-grade log?

A. Well, I don't know whether you want the complete answer on that or not. But the scaling rolls—— [354]

Q. Well, just generally how does it differ from—a saw log, I presume, is the other category?

A. High-grade logs free from knots, certain diameters, sizes.

Q. You might describe for the record—I am sure the Court knows it—but how is a peeler log processed in the plant?

A. In the operation at Mapleton the peeler logs were rotary-peeled; they were put on a lathe and turned and turned against a knife. The logs are first cut into 8-foot lots, I should explain, and put into a lathe and turned and turned against a knife, and the resulting product is a thin veneer which is used in the process of—further process of laying up

(Testimony of Frank W. McPherson.)

into—in gluing into plywood, cross-laminating into plywood.

Q. Does that process leave a log core, then, after several layers have been peeled off? is there a log core left out of the peeler log?

A. Yes, there is a——

Q. What use is made of that?

A. It's put into lumber.

Q. Then treated as a saw log, is it?

A. Yes.

Q. Then is the saw log the other type of log that comes out of an operation of this kind?

A. Saw log or pulp log.

Q. Yes. What is the saw log? [355]

A. Well, that would be all the other fir logs that are too rough, knotty, defective, to be peeled in the peeling operation.

Q. How is it processed in the mill?

The Court: What is the relevancy of this?

Mr. Biggs: I was just showing your Honor—he said the mill inventory—that he would go to places——

The Court: Well, talk to him some other time.

Mr. Biggs: All right. If the Court is not interested in it, it doesn't make any difference to me.

The Court: All right.

Q. (By Mr. Biggs): How do the requirements of these various kinds of logs affect your logging plan?

A. We had to adjust the areas into which we put loggers to maintain our inventory ahead of the

(Testimony of Frank W. McPherson.)

various plants. Our consumption of peeler logs was approximately the rate of 100,000 a day, and our saw logs at the rate of about 125,000-140,000 a day.

Q. Did you treat the Seaver tract separately and specially, or was that treated as just a part of an entire unit out there?

A. It was part of our entire holding.

Q. We have shown on the map in green and red logging lands immediately contiguous to the Seaver tract. Were other lands not shown in color owned by Siuslaw or the timber on them owned by Siuslaw and subsequently U. S. Plywood immediately contiguous to the whole area?

A. Yes, sir; many acres, particularly due north and northeast of that tract in the whole—practically the whole area covered by the northeast corner of that map was——

The Court: Do I understand your testimony to be that from time to time you would send your loggers into the Jump Creek area and take No. 1 or peeler logs off the Seaver tract as well as the adjacent tracts as one operation?

The Witness: As one operation, yes.

The Court: And then you would move out and, perhaps, at a later time take out saw logs from another area but part on the Seaver tract and part on the adjacent tract?

A. We would do it in various combinations, yes sir.

The Court: All right.

Mr. Biggs: You may cross-examine.

(Testimony of Frank W. McPherson.)

Cross-Examination

By Mr. Dezendorf:

Q. Mr. McPherson, as I understand it, you first came to the Mapleton area to work for Siuslaw in March of 1946? A. That is correct.

Q. Your title or capacity at that time?

A. I presume you could call it logging engineer, woods engineer.

Q. Was there a logging superintendent over you at that time? [357] A. No, sir.

Q. So that in addition to being a logging engineer you were actually the logging superintendent, were you not, that had charge of all of the logging operations of the Siuslaw Company?

A. Not at that time I didn't have all those duties.

Q. Well, who was the logging superintendent over you?

A. There was—there was no logging superintendent. The Manager at that time would have been the—my immediate supervisor. There were at times—about that time there was another man or two that worked various times as contract supervisors.

Q. But I take it that you had charge of whatever logging was done for the company at that time?

A. Not in 1946 when I first went there.

Q. Well, who did have in 1946, then?

A. Mr. McCann. J. D. McCann, the Manager.

(Testimony of Frank W. McPherson.)

Q. Well, when did you become the top man so far as the logging operations were concerned?

A. I received the official capacity as logging superintendent at the time Mr. Stevens came to the operation.

Q. All right. Can you give us any kind of a date on that?

A. Oh, about 1948. 1948 or '49. About that time. November of '48.

Q. So that it would have been before any logging operations were performed on the Seaver property, is that correct? [358]

A. That's correct.

Q. So that at the time the logging commenced on the Seaver property you were the logging superintendent of the company?

A. That is right.

Q. And you had charge of whatever logging was done there and were overseeing that operation?

A. That's right.

Q. Now, when did you cease overseeing the logging, if you ever did?

A. I never did in its entirety until I left in 1955.

Q. So that actually during the time that the Seaver property was logged from '49 to '55 you were the man in charge of the logging operations for the company?

A. That is correct.

Q. Now, toward the end you had managerial duties of the mill itself along with your logging responsibilities, did you not?

A. That is right.

Q. Now, when did those commence?

(Testimony of Frank W. McPherson.)

A. That would be in, I believe, the year 1952 when the present—or the then Manager, Mr. Stevens, died. I was assigned those duties.

Q. So that from 1952 when Mr. Stevens died until you left in the late summer, as I recall, of 1955 you were the top operating Manager of the mill and the woods operation for the company on the ground, were you not? [359]

A. That is right.

The Court: Was there a Manager over you on the ground?

The Witness: No, sir.

Q. (By Mr. Dezendorf): I take it you were the Manager, were you not? A. I was.

Q. And you were the chief executive officer that was there? A. Yes.

Q. Yes. And I notice that these timber removal affidavits which are Exhibit 4 are executed by you before a Notary Public as the duly authorized agent of Siuslaw Forest Products, Inc.

Would you like to hand these to the witness, please, so that he may verify those?

(Whereupon the Crier did as requested.)

Q. (By Mr. Dezendorf): If you will look at the first paragraph up there—it's where it says you are the duly authorized officer of Siuslaw. Do you find it? A. That's right.

Q. And at the time you executed those you were the duly authorized officer of Siuslaw to execute them, were you not?

(Testimony of Frank W. McPherson.)

Mr. Biggs: Well, if the Court please, my objection is to the use of the word "officer." He has testified he was not an officer.

Mr. Dezendorf: We will say agent. I didn't intend it, Mr. Biggs. [360]

Mr. Biggs: I am sure you didn't, but I wanted the record to show that we weren't acquiescing.

Q. (By Mr. Dezendorf): At the time you executed those affidavits on behalf of Siuslaw, Mr. McPherson, you were the person authorized by it to execute and file them, were you not?

A. I filed them.

Q. Well, you were the one that was authorized to do it, were you not?

The Court: Well, by whom were you authorized?

The Witness: I am afraid I couldn't say that I had a direct authorization from anyone to file these.

Q. (By Mr. Dezendorf): Well, did you swear in those affidavits that you were——

The Court: Well, obviously he did swear to it. But there is a little difference. You are asking him for a conclusion——

Mr. Biggs: That's right.

The Court: ——as to whether he was authorized. I don't think you can show it from him; but, suppose he does admit that he was authorized? What is that going to prove?

Mr. Dezendorf: Well, someone had to be authorized to do it and, apparently, this was the man.

The Court: Well, that's an inference that you draw from the fact—— [361]

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: That he swore that he was.

The Court: Yes. But I think that you have already shown that he was the Manager of that operation. If that carries with it the authority to make the affidavit, then he has been authorized. If that doesn't carry with it that responsibility or that privilege, then I think you will have to show that he got authorization someplace else.

Mr. Dezendorf: Well, the point I am trying to make is that I believe it is proper to show when an agent is on the stand what the extent of his authority was.

The Court: That's fine.

Mr. Dezendorf: You can't do it by extrajudicial statements, I understand that. But when the agent is in court and on the stand I think we are entitled to try to prove his authority through him.

The Court: Yes; but not by a question which calls for a conclusion.

Mr. Biggs: That's right.

Mr. Dezendorf: Very well. Let me take another run at it, then, please.

Q. At the time those affidavits were executed, Mr. McPherson, which are before you, to your knowledge was there anyone else connected with Siuslaw authorized to execute them on its behalf?

Mr. Biggs: It was what? [362]

Mr. Dezendorf: Authorized to execute them on its behalf.

Mr. Biggs: I object to that for the same reason that the authorization is a conclusion of law. If

(Testimony of Frank W. McPherson.)

Counsel wants to ask him did any officer of the company direct him to do that, and who, I would have no objection to the question because I think it would be competent for the agent to prove authority by direct statements; that is, the facts from which the inference might be drawn.

The Court: I think that the question is a loaded question. You asked him "if anyone else," which implies that he was authorized. That's the very point that you are trying to inquire about. You can't assume his authority by asking him this additional question. I am going to sustain the objection.

Q. (By Mr. Dezendorf): Who was your superior, if anyone was, at Siuslaw at the time those affidavits were executed and filed by you?

A. This one marked January, 1951?

Q. Well, that's the first one. You will have to take them one by one.

A. In January, 1951, Mr. Stevens was the General Manager.

Q. Did he know that you filed those affidavits?

A. I'd say yes, he knew that.

Q. Did he object to your filing them? [363]

A. Not to my knowledge.

Q. Now, take the next one; who was your superior, if any, at the time you executed the next one?

A. The next one is for the same year, January, 1951.

Q. So your answer would be the same on that, is that correct?

A. That's correct.

(Testimony of Frank W. McPherson.)

Q. Now, take the next one.

A. January, 1950.

Q. Who was your superior then, if there was one?

A. The same man.

Q. Did he know that you executed and filed that affidavit?

A. As far as I know, he did.

Mr. Biggs: I take it, if the Court please, that's not responsive. I think that that would call for a direct answer. He either knew or didn't know whether the—who his superior was.

The Court: Well, can you say he knew or didn't know?

The Witness: I don't believe I can.

The Court: Did you talk it over with him?

The Witness: To my knowledge, I didn't.

The Court: Did you hand him a copy?

The Witness: No, sir.

Q. (By Mr. Dezendorf): Well, copies were retained in the company's files, were they not? [364]

A. I am sure they should have been.

Q. Yes. Now, what is the next one?

A. That's January, 1951, again.

Q. So that would go in accordance with your first answer; right? What is the next one?

A. That's all.

Q. Now, turn them over and get the white ones. What is the date on that one?

A. Here is one, December 31, 1953.

Q. Does that one bear your signature?

A. No, sir.

Q. What is the next one?

(Testimony of Frank W. McPherson.)

A. December, 1953.

Q. Does that bear your signature?

A. No, sir.

Q. What is the next one? Then we are back to where we started, are we not?

A. No, sir. There is December, 1955.

Q. Does that bear your signature?

A. No, sir.

Q. What is the next one?

A. December, 1954.

Q. Does that bear your signature?

A. No, sir.

Q. All right. Now, are we back to where we started? [365] A. That's right.

Q. In 1950, as I understand it, you were the logging superintendent for Siuslaw; is that correct, Mr. McPherson? A. That is correct.

Q. So that you had charge of the logging operations that were conducted, is that correct?

A. That's right.

Q. Did you consider it a part of your duties to file the timber affidavits at that time, after the logging had been completed? A. Yes.

Q. Now, when you came there in March of 1946, Mr. McPherson, I take it that the mill at Mapleton of Siuslaw was in operation; is that correct? A. That is correct.

Q. Were you familiar with the fact which Mr. Davidson alluded to yesterday that that mill had been bought up in Washington and disassembled and brought down and reassembled at Siuslaw, or

(Testimony of Frank W. McPherson.)

did you know that? A. I had heard that.

Q. What type of mill was it in March of 1946, with respect to the type of logs that it was designed to cut?

A. It was a mill that would handle up to 40-foot-long logs—from 12-foot to 40-foot in length.

Q. In length. Now, how about diameter? [366]

A. Any log up to—72-inch opening carriage. So it will take up to 8-, 9-foot logs.

Q. Now, was that mill designed to operate on small-diameter logs? A. Not entirely.

Q. It was basically designed to work on large old-growth logs, was it not?

A. No, sir; large logs.

Q. Large logs. What would you consider to be the lower limit of diameter of a large log?

A. That's a difficult question to answer for that particular mill. Basically, larger logs.

Q. Well, can't you give us some kind of a lower limit as to what a large log would be?

A. You cut logs of all sizes in the mill. I'd presume that the mill was designed to cut logs from about 8 inches to—up to 8 inches in diameter up to the diameter I mentioned. It would probably do—cut more lumber on logs if they were from 15 to 36 inches in diameter than it would on any other size, even including the large ones.

Q. When was the mill put in adjacent to the big mill?

A. There was not a mill put in adjacent to the big mill.

(Testimony of Frank W. McPherson.)

Q. Well, was there a mill put in to cut up smaller logs?

A. Correction. There was; yes sir.

Q. Where was it put? [367]

A. Let me refresh my memory. You are referring to the Huntington mill?

Q. I am talking about the one right in the vicinity of the big mill at Mapleton.

Mr. Biggs: Was your question when or where?

Mr. Dezendorf: Well, I started out by "when" and now I am trying to get "where," because he said he didn't know whether it was adjacent or not.

The Witness: I have to refresh my memory. This is going back. There was a small mill put in alongside of the large mill called the stud mill.

Mr. Dezendorf: All right.

Q. When was that put in?

A. I can't answer it exactly.

Q. It would have been in 1950 or later, would it not? A. I'd have to think.

The Court: Do you know the date?

Mr. Dezendorf: We understand it was '50 or later.

Mr. Hoffman: I think it was 1951.

The Witness: I am trying to recall in my mind. I think it was put there when Mr. Holmes was Manager of the operation. That was before 1948.

Mr. Dezendorf: Is there someone here that would know, Mr. Biggs?

Mr. Biggs: A stud mill? [368]

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: When the smaller mill was put in adjacent to the large mill.

The Court: Mr. Husband, do you know?

Mr. Husband: Yes, I believe I do.

The Court: We have got a man who knows.

Mr. Biggs: If you want to call Mr. Fox, he said it was there when he came there in 1948, the stud mill you are talking about.

Mr. Dezendorf: I don't know if we are talking about a stud mill or not.

Q. What was the type of operation that was there when you came in March of 1946? Was it just the large mill?

A. A large mill and a plywood plant.

Q. All right. And it was sometime after you came that the smaller mill was put in, is that right?

A. This particular small mill; yes, sir.

Q. Now, was there more than one small mill put in besides the big mill? You keep talking about this particular one. I am trying to analyze that.

A. We acquired a larger volume of timber, at which we also acquired the sawmill.

Q. And where was that sawmill located?

A. At Mapleton.

Q. Was that mill that you acquired that you are now speaking of one designed to cut smaller logs, too, as well as the stud [369] mill?

A. It was cutting—I should say that it couldn't cut as large a log as the company's mill.

Q. Well, now, when did you acquire this second small mill that you are talking about?

(Testimony of Frank W. McPherson.)

A. That was either in the year 1951 or '52.

Q. Well, that's obviously the one we are talking about. It would be after 1950, in any event.

The Court: He says either '51 or '52.

Mr. Dezendorf: All right.

Q. So that we have this progression: When you came there in March of 1946 they just had the one large mill which would cut logs up to, I think you said, 9-foot diameter, did you not?

A. That's right.

Q. Then in, perhaps, '48 or '49 they put in a smaller mill to cut studs, is that right?

A. To cut the cores from the peeler plant.

Q. Was that all that went through that small mill was the cores from the peeler plant?

A. I couldn't honestly say.

Q. All right. Then in '51 or '52 you acquired another smaller mill which was designed to cut smaller logs than the big mill, isn't that right?

A. We didn't buy the mill; we got it with the timber.

Q. All right. But, in any event, you got it and you used [370] it; correct?

A. I might qualify that a little bit. We rebuilt the mill.

Q. All right. A. So we could use it.

Q. Fine. But you did use it?

A. That is correct.

Q. Now, talking about the large mill that was there when you were there in 1946, did they run small second-growth logs through that mill?

(Testimony of Frank W. McPherson.)

A. Yes, they did.

Q. When?

A. At all times, to my knowledge.

Q. Even after the small stud mill and the other small mill that you acquired and rebuilt were acquired and were in operation? A. Yes, some.

Q. Do you know whether it was economical from a mill manufacturing standpoint to run small logs through that large mill?

Mr. Biggs: I object to that, if the Court please, as being irrelevant to any issue in the case.

The Court: Well, I have already indicated I am not very much impressed with that testimony. But I am going to let him answer the question anyway.

The Witness: What time are you speaking of? [371]

Q. (By Mr. Dezendorf): Whenever you were running a small one through.

A. I'd say it was economical.

Q. As economical as a large log?

A. No. But if you are going to make every log stand on its own, every log has a different economic factor going through a sawmill.

Q. Now, I believe the map—if I may approach it—has an arrow here in Section 19 with a title after it, "Road here 1942-1946," which is the end of the red line. Do you see the point that I am referring to? A. Yes, sir.

Q. I take it that the road terminated there

(Testimony of Frank W. McPherson.)

from 1942 until 1946, is that what that legend means?

A. Yes. I wouldn't know because I wasn't there during that entire time.

Q. But you came there in 1946 and that's where the road ended, is it not? A. That is right.

Q. All right. So that it might not have been that far in in '42 is what you are saying, is that correct? A. I have no way of knowing.

Q. Right. Now, what type of terrain is covered by the red portion of the road shown on the map? Is it generally sloping or do you go over crests or mountains, or what? [372]

A. Well, the general terrain is typical of the whole area. The road is built up—along the stream bottom.

Q. So that it doesn't go over any mountains on the red part? A. No.

Q. So that it's a more or less gradual grade—upgrade in the red part; correct?

A. Correct.

Q. And what would be the maximum percentage of increase in grade in the red part of the road; 8 per cent, 6 per cent, or what?

A. What do you mean increase in grade?

Q. Well, as I understand it, if a road increases two feet in a certain distance you get a 2 per cent grade; is that correct? A. That's right.

Q. Are you familiar with grades of roads?

A. Yes, sir.

Q. You build them, don't you?

(Testimony of Frank W. McPherson.)

A. Yes, sir.

Q. What is the maximum grade——

The Court: Take off the word “increase” and use the word: “What was the grade on this road?” and he will tell you.

Mr. Dezendorf: Very well. I think it’s either an increase or a decrease, however, your [373] Honor.

Q. What was the maximum grade on the road that is in the red?

A. Probably 10 or 12 per cent.

Q. Would there be more than one place where it was 10 or 12 per cent?

A. I don’t think so.

Q. Generally you were coming up a creek bed, were you not? A. That is right.

Q. Now, take the part that starts in black? How far do you go on the black before you reach a grade that is over 12 per cent?

A. Not very far.

Q. And what is the maximum grade on the black road between the end of the red line and the first portion of the Seaver property where the black line enters? A. Around 15 per cent.

Q. Doesn’t it ever go over 15 per cent?

A. I don’t believe so.

Q. How many mountain ranges or—what do they call them on the map?

Mr. Husband: Ridge.

The Court: Ridges, is that what you are talking about?

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: I will see what they call them here. Yes.

Q. How many mountain ridges do you cross with the black line [374] from the end of the red line to the commencement of the Seaver property?

A. You are crossing but one ridge.

Q. How many times do you cross it?

A. Well, the main ridge that you cross is the ridge between the Jump Creek, Smith River area and the Hadsell Creek or Siuslaw area.

Q. Are you familiar with the cost of construction of any portion of that road?

A. To a certain extent.

Q. Was it—was the building under your supervision and control? A. Yes.

Q. What do you estimate it cost per mile of the red portion of the road?

Mr. Biggs: I am making an objection to this line of questioning, if the Court please. May I have a continuing objection?

The Court: I assume it's relevant so I am going to let it in. I don't know the purpose of it.

Q. (By Mr. Dezendorf): Would you like the question again, or do you have it in mind, Mr. McPherson?

A. Well, I'd have no way of knowing of the cost at the time it was built.

Q. You don't even know the cost at the time you were in control [375] of the building of it?

A. Well, you are talking about the red portion?

(Testimony of Frank W. McPherson.)

Q. All right. Let's forget the red portion. Let's talk about the black portion, then.

A. All right, sir. The approximate cost?

Q. Yes; per mile.

A. I imagine around \$15,000.

Q. A mile, on the average?

A. (Witness nods head.)

Q. Now, there was a period, a lapse of eight years between the time that the black road commenced at the end of the red line until it got to the middle of the Seaver property, is that correct?

A. As I told you before, I couldn't verify that that road stopped in '42.

Q. All right. When did it get into the middle of the Seaver property?

A. In 1950.

Q. According to the map, it stopped on the red part in 1942, is that correct?

A. That's what the map says.

Q. Do you have any reason to believe that isn't a correct representation of the facts?

A. No.

Q. Now, I believe you have said that the Seaver property was [376] logged mainly by contractors for Siuslaw or U. S. Plywood, is that correct?

A. In the main.

Q. During the time that they were logging there you were the logging superintendent or the Manager in direct charge of the logging operations, is that correct?

A. That's correct.

Q. So that you were the one in your organization who was charged with the duty of supervising and controlling and watching the contractors, is

(Testimony of Frank W. McPherson.)

that correct? A. That would be correct.

Q. And you performed your duty in that regard?

A. I intended to.

Q. Did you? A. I think so.

Mr. Biggs: Had you concluded?

The Court: No. No. He just asked him if he did a job all right.

Mr. Biggs: We will admit that, your Honor.

Q. (By Mr. Dezendorf): In connection with your duties in supervising these logging operations, did you go out onto the Seaver property from time to time during the course of its logging?

A. Yes, I did.

Q. And you were pretty well familiar with what was going on [377] there, were you not?

A. Fairly familiar.

Q. You were the one in your organization who was more familiar than anyone else with what was going on there, is that correct?

A. Well, I couldn't say that; no, sir.

Q. Did you have someone under your jurisdiction who had responsibilities with regard to the logging contractors that were performing there?

A. There were several people with responsibility.

Q. All right. Tell us who they were and what their responsibilities were.

A. During that period of time Mr. Fox was in the logging department.

Q. And he was one of your subordinates?

A. That is right.

(Testimony of Frank W. McPherson.)

Q. He reported directly to you?

A. That is right.

Q. And what were his duties?

A. At that particular time he was the man who would be responsible for the road surveying and road construction and working on the property lines, and things of that nature.

Q. But he had no direct supervision or responsibility with respect to the logging contractors that were taking the logs, did he? [378]

A. Right at that particular time I'd say, No.

Q. All right. Now, who else had some responsibility with regard to it that you mentioned?

A. We—most of that timber, I believe, was felled and bucked by employees of the company.

Q. All right. When would that have been? What year?

A. 1949, 1950.

Q. At that time you were logging superintendent, so the company employees were under your direct supervision and control, is that correct?

A. That would be right.

Q. Now, who else?

Mr. Biggs: Keep your voice up just a little bit, please, Mr. McPherson. Sometimes we don't hear you.

Q. (By Mr. Dezendorf): Who else was there you say was a subordinate of yours that had something to do with the logging operations that were conducted on the Seaver property?

A. We had a man in charge of the cutting crew.

(Testimony of Frank W. McPherson.)

Q. That would be during the time that your own employees were cutting, would it not?

A. Right.

Q. Now, let's go over to the time from there when it was being done by contractors for you. Did you have any other subordinates that had anything to do with logging contractors who were logging the Seaver tract other than Mr. Fox that [379] you mentioned?

A. The bull buck, Mr. Crabbe.

Q. Who? A. Crabbe. C-r-a-b-b-e.

Q. And was his duty as a bull buck?

A. He was the actual foreman in charge of the cutting crew.

Q. And he was a direct subordinate of yours?

A. That is right.

Q. And reported to you? A. That's right.

Q. Were there any other subordinates of yours that had anything to do with the logging contractors that logged the Seaver property?

A. I don't believe so.

Q. Even though you had those subordinates out there, you yourself were out there and were familiar with what was going on during the logging of the Seaver property? A. Generally, yes.

Q. Now, did you have—excuse me.

May I have those Conservation Permits which, I think, are No. 5?

(At this point the documents requested by Mr. Dezendorf were handed to him by the Clerk.)

(Testimony of Frank W. McPherson.)

Q. (By Mr. Dezendorf): Did you make application for and procure [380] the Forest Option and Conservation Harvesting Permits with respect to the logging that was performed on the Seaver property, Mr. McPherson?

A. I'd have to answer that that I undoubtedly did for some of it.

Q. Who would have done it when you didn't?

A. Mr. Fox could have done it at times, and also at times the logging contractors would have secured a permit.

Q. Now, in the case when the logging contractors procure the permits, would they consult with you as to the method of logging and whether to leave seed trees or strips or blocks, or would that be their sole responsibility without consulting you?

A. That's—generally they would get that information from us.

Q. So that you would be the one that would try to co-ordinate the method in which seed trees or strips or blocks would be left as this Seaver property and your other properties were logged; is that correct?

A. That is right.

Q. Now, I take it, Mr. McPherson, that as of this moment timber removal affidavits have been executed concerning all of the land involved in the Seaver tract; is that correct, to your knowledge?

A. As of this moment? [381]

Q. Yes; as of now.

A. I think that's right.

(Testimony of Frank W. McPherson.)

Q. Has all of the merchantable timber been removed from the Seaver land?

A. As of this moment?

Q. Yes. A. That I don't know.

Q. Now, Mr. McPherson, were you familiar with the fact that logging operations were conducted on portions of the Seaver tract after timber removal affidavits had been filed with respect to that particular portion? A. That is right.

Q. You knew that that was being done?

A. Yes, sir.

Q. Now, as I understand your statement on direct, Mr. McPherson, you said that you conducted the logging operations on the Seaver property just the same as were conducted on other properties which was owned in fee by Siuslaw or U. S. Plywood. Did I understand you correctly?

A. That would be about right, yes. Every tract has its own peculiarities.

Q. But I mean with respect to the selection of trees, and things of that kind, you logged it just the same as you did property that you owned in fee?

A. Within reason, yes. [382]

Q. You intended to take whatever trees were actually taken from the Seaver tract, is that correct? A. I would say Yes.

Q. Including the cedar that was taken; is that correct? A. I don't know.

Q. What was that?

A. I said I don't know.

Q. Well, what don't you know?

(Testimony of Frank W. McPherson.)

A. Whether we intended to take the cedar or not.

Q. Well, you knew that you took it, didn't you?

A. No, I don't.

Q. You don't even know it now? A. No.

Q. You have never been told that cedar was logged from the Seaver property?

A. I understand that there was some cedar stumps out there, but I know nothing of cedar logs.

Q. How many times have you been on the Seaver property?

A. I have been on or through it quite a few times, sir.

Q. It would be in the hundreds of times, wouldn't it? A. I presume, yes.

Q. And you never saw a cedar tree on the property? A. No, sir.

Q. Never did?

A. Not that I could stand here and [383] declare.

The Court: How many cedar trees were on this 408 acres?

Mr. Dezendorf: Five trees, 8,000 feet.

The Court: Five trees in 400 acres.

Q. (By Mr. Dezendorf): As a matter of fact, weren't the cedar trees right on the edge of the farm land by the orchard? Does that refresh your recollection? A. I don't know.

Q. Do you know where the orchard was?

(Testimony of Frank W. McPherson.)

A. I think there was some fruit trees on the westerly side of the property.

Q. But you don't recall any cedar trees right in the vicinity of the orchard?

A. I don't recall.

Q. All right. I take it, Mr. McPherson, that when the second-growth timber was taken from the Seaver land in the period 1951 to 1955 that you intended to take it and knew what you were taking; is that correct?

A. That is correct.

Q. When, if ever, Mr. McPherson, did you examine the Warlick-Siuslaw May 4, 1942, contract?

A. Well, we had it in our records there all the time.

Q. Were you familiar with it all the time?

A. During the time of this operation, speaking about '49-'50, I'd say Yes.

Q. So that you were familiar with the terms of the May 4, 1942, [384] contract during the time that logging operations were performed on the Seaver tract?

A. Yes.

Q. And it was right in your file?

A. In our file.

Q. And even with that you conducted your logging operations on the Seaver property just as if you owned the fee, is that right?

A. That is right.

Q. Mr. McPherson, even prior to the time logging commenced on the Seaver property you had aerial photographs of the timber on it, did you not?

A. No, we didn't.

(Testimony of Frank W. McPherson.)

Q. When did you first get the aerial photographs?

A. As I recall, the flight was made during the year of 1949. I don't know whether it was completed that year or completed in 1950.

Q. But, in any event, when the flight was completed you procured one of the aerial photographs of the timber, did you not?

A. Some time afterwards.

Q. Didn't you also have type and specie reports of the timber on the Seaver property at some time during the course of the logging operations?

A. No, sir.

Q. Who did the aerial photographing [385] work? A. Delano.

Q. Now, did you have written contracts with the contract loggers who logged the Seaver property in 1949, 1950 and up to 1955?

A. I couldn't say that we did. I don't believe that we did.

Q. Your best memory is that you didn't have, is that correct? A. (Witness nods head.)

Q. Do you know why it was, then, Mr. McPherson, that Mr. Seaver was requested to execute a written contract in connection with his operation on a small portion of his property for your company? A. At what time was that?

Q. In 1955.

A. I might say that conditions had changed within the organization and within the U. S. Ply-

(Testimony of Frank W. McPherson.)

wood. We now have contracts with all of our loggers.

Q. So that you think Mr. Seaver was the first one of those who logged on the property that came under this new policy, is that correct

A. I wouldn't say that. I moved to Gold Beach in 1955 and started operations down there and our loggers—our contractors—and they have contracts written.

Q. Well, you were in charge of the Mapleton office of U. S. Plywood at the time the negotiations were going on with [386] Mr. Seaver, were you not?

Mr. Biggs: You mean for this contract?

The Witness: Yes, sir.

Mr. Dezendorf: Yes.

Q. When did you leave?

A. I left in 1955.

Q. Yes. Give us the dates.

A. December—1st of December.

Q. You didn't know at the time you left that negotiations were going on with Mr. Seaver for a written contract to cut a portion of the Seaver tract when you left? A. I don't believe I did.

Q. You didn't know that contract was dated August 19th, 1955, although it was executed somewhat later? A. No.

Q. Would that have been under your direct supervision, control, as Manager while you were there?

A. It should have been. Pardon me.

(Testimony of Frank W. McPherson.)

Q. Excuse me. Yes?

A. I have to stand corrected, your Honor. During—I wasn't Manager up to—I made a false statement back there. I will have to get Mr. Husband to remember this date. But some time in 1954 a Manager was brought into the Mapleton Division over the plywood, the sawmill and the timber, logging departments, and at that time I severed my relationships with [387] the logging and timber department and handled just the milling operation.

Q. All right. Who was that superior that you talked about?

A. Mr. Demoisee.

Q. All right. So that after he came some time in '54 or '55 you then became what, the Manager of the Siuslaw large mill?

A. I was the sawmilling operation.

Q. That included the three sawmills that we have talked about, then?

A. No.

Q. Which one?

A. The—that sawmill history goes back and forth from pillar to post.

Q. Well, just tell us what ones you were in charge of when Mr. Demoisee came in '54 or '55.

A. At that time we were operating but two mills, I believe.

Q. Were you in charge of both of the sawmills?

A. Yes.

Q. And you still were the logging superintendent of the logging operation?

A. No.

Q. Who was, of the logging operation?

A. Mr. Fox.

(Testimony of Frank W. McPherson.)

Q. Well, was he not one of your subordinates?

A. Up until that time. [388]

Q. Then he came out from under your jurisdiction, is that right?

A. That is correct. I don't think you understand what—that it is——

The Court: He just looks that way. That doesn't mean anything.

The Witness: Could I digress a minute so I can explain to him?

The Court: I think he knows. Don't worry about him.

Q. (By Mr. Dezendorf): Well, I just want to get it clear, Mr. McPherson.

The Court: Well, then, go ahead and explain it to him.

Mr. Dezendorf: I want you to feel happy about it.

The Witness: Well, when I said I was Manager of the logging and milling—sawmilling operations——

Q. Right.

A. There was also a Manager of the plywood operations——

Q. Right.

A. ——acting independently of—on an equal with me.

Q. Right.

A. And I overstepped my time element when I said I was Manager of both operations when I left.

(Testimony of Frank W. McPherson.)

Q. Right.

A. In 1954 a Manager was put in over the entire operation.

Q. Right. [389]

A. And at that time I concentrated my duties on the sawmill and turned the woods part over.

Q. I didn't get what you said.

A. I didn't turn it over; I stepped out of the logging and lumbering—or logging and timber department activities.

Q. Well, who took your place as in charge of the logging and lumbering operations on the property that we are concerned about?

A. Just—not lumbering, logging.

Q. Logging? A. Logging and timber.

Q. Right. Logging and timber.

A. Mr. Demoisee was the General Manager.

Q. Well, but who took over your duties as the superintendent of the logging operation?

A. Mr. Fox.

Q. And he was not, then, a subordinate of yours?

A. No, sir.

Q. A co-ordinate man with you?

A. Correct.

Q. And you think he took over in 1954 some time?

A. That would be the best of my recollection.

Q. Right. There was one thing, Mr. McPherson, mentioned in Mr. Fox's deposition I would like to ask you about. Were there little maps made of

(Testimony of Frank W. McPherson.)

the areas cut and the amount of [390] timber out as the logging progressed on the Seaver property?

A. Not to my knowledge.

Q. Did you attempt to keep any kind of records of what you procured while you were logging superintendent from the various areas that were logged while they were logged? A. Yes.

Q. On what kind of records did you keep that information? A. The log book records.

Q. Now, is that the timber inventory and depletion record that you are speaking about?

A. No, sir.

Q. It's something else?

A. There is some in—maybe I could refer to them differently, logs that were——

The Court: Have you seen that document here in court?

The Witness: Well, I couldn't say I had. It's logs that are where they are scaled by the Bureau.

Mr. Dezendorf: No. Mr. Fox referred to something that you kept which were little pictures or diagrams of areas logged showing what had been taken off that area during the progress of the logging.

Q. Now, do you know anything about that?

A. He would be referring to the timber depletion record.

Q. Well, he talks about pictures. Maybe I can help you on that. [391]

The Court: What page?

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: It's 105, I believe, of his deposition.

The Court: All right.

Mr. Dezendorf: Yes, starting at Line 12.

Q. This will just be to refresh your recollection.

The Court: Here (handing document to witness). Read Line 20.

Mr. Dezendorf: It isn't his deposition.

The Court: I know. I read the Fox deposition this morning.

Mr. Dezendorf: All right. Line 12.

Q. Do you find it? This is of Mr. Fox.

"Q. Now, in connection with your accounting, whether it's at the end of the year or not, do you furnish certain maps showing timber areas and timber cut and that sort of thing?

"A. At the end of the year, sure, we show what has been cut.

"Q. On a map? A. On a map.

"Q. What kind of a map do you use?

"A. Well, it varies. Anything to make a picture, you might say, or show where the cutting is.

"Q. Who requests that of you, Perry?

"A. Well, the same comptroller. [392]

"Q. What are you supposed to show on those maps?

"A. You are supposed to show what has been cut that year.

"Q. You show the area?

"A. The area that has been cut."

(Testimony of Frank W. McPherson.)

I thought there was some place it referred to you here.

A. My answer is the same.

Q. You still don't know anything about those records? A. The timber depletion records.

Q. But nothing other than that?

A. That's what he is referring to.

Mr. Biggs: Mr. Dezendorf, if you will read past the interruption there, I think the witness will clarify it.

Mr. Dezendorf: I though there was a reference to McPherson.

Mr. Biggs: He was referring only to depletion——

Mr. Dezendorf: I thought there was a reference to Mr. McPherson.

Mr. Biggs: On Line 8, 106, he says: "what we show. The only footages I know that we show is for depletion."

Mr. Dezendorf: Here. I find it on Page 107, Line 6—or Line 5.

"Q. What would you have?

"A. Like if we confined these records that we was [393] talkin' about Frank kept and George kept, why, they would be there according to tract and that's the only thing that I can——"

Now, does that mean anything to you about records you kept about the timber that you removed from each portion?

A. That's the same depletion records.

Q. You think that's what it is?

(Testimony of Frank W. McPherson.)

A. Yes, sir.

Q. You know nothing about any annual pictures or anything of that kind or diagrams?

A. Just for depletion.

Mr. Dezendorf: That's all.

The Court: Let me ask you a question. At the same time you were filing removal affidavits on the Seaver tract were you filing removal affidavits on the adjacent properties owned by the company in fee?

The Witness: That is right, sir.

The Court: And subsequent to the time that these removal affidavits were filed on the property owned in fee by the company, was there logging on some of those tracts?

The Witness: I didn't get the entire question, your Honor.

The Court: After these affidavits were filed on properties, tracts adjacent to the Seaver tract, did you go in there and log that property? [394]

The Witness: Yes, sir.

The Court: In other words, you treated the Seaver property identically in the same manner with the property owned in fee by the company?

The Witness: That is correct.

The Court: All right. Go ahead if you want.

Mr. Dezendorf: No more.

Mr. Biggs: I don't think we have anything more. I will ask the Bailiff to show the witness the Defendant's Exhibit now, 6.

The Court: He has got it there.

(Testimony of Frank W. McPherson.)

Redirect Examination

By Mr. Biggs:

Q. I will ask you to examine that and state if you wrote the letter accompanying the check and if you know who issued the check, Mr. McPherson?

A. Yes. I did.

Q. What was that in payment of, Mr. McPherson?

Mr. Dezendorf: I think it speaks for itself.

Mr. Biggs: Very well.

Mr. Dezendorf: It's already admitted.

Q. (By Mr. Biggs): Was that issued following a conference you had had with Mr. Tucker relating to the timber taxes on the property? [395]

A. That is right.

Mr. Biggs: Yes. We offer that in evidence.

The Court: Tucker?

Mr. Biggs: Yes, Tucker, your Honor. That's preceding it. We just simply want the record to show that we paid timber taxes.

Mr. Dezendorf: That's already in the record.

Mr. Biggs: That's all.

The Court: Wasn't there one exhibit that you wanted to see the stub on?

Mr. Dezendorf: Yes, that—and that reminds me of another thing. You remember Mr. Moore was going to give me that comparison, the tax returns with the timber depletion. Has that been completed?

Mr. Biggs: Yes, I am sure that it has.

(Testimony of Frank W. McPherson.)

(Discussion off the record.)

Mr. Dezendorf: I didn't want to put their whole tax returns in because it was silly.

Mr. Biggs: Let me check on that. I won't forget.

The Court: That's all.

Mr. Biggs: Wait just one minute.

Q. Some of the affidavits that have been referred to here that you said you hadn't identified were affidavits signed by Mr. Seaver, I believe, is that correct?

A. That's what it shows. [396]

Q. On the property that was subsequently logged, is that correct?

The Court: Subsequently logged? I don't understand that. I looked at those affidavits.

Mr. Biggs: I don't know. I am just wondering——

The Witness: I presume——

Mr. Biggs: You don't know. All right. We have no further questions.

Mr. Dezendorf: Well, I want——

The Court: Are the descriptions of the property identical with the Seaver tract in controversy?

Mr. Biggs: Which ones?

The Court: The ones signed by Seaver.

Mr. Biggs: Yes.

Mr. Dezendorf: They are prepared by U. S. Plywood and taken to him to sign as the owner. I think we can develop that through this witness if that is a matter in your Honor's mind.

(Testimony of Frank W. McPherson.)

Mr. Biggs: I don't know what the history of those are except that they bear Seaver's signature.

Recross-Examination

By Mr. Dezendorf:

Q. You recall, do you not, that on some occasions timber removal affidavits were prepared by you and taken to Mr. Seaver [397] for his signature as the owner of the land? A. I understand they were.

Q. And they were prepared in your office, were they not? A. I believe they were.

Redirect Examination

(Continued)

By Mr. Biggs:

Q. And he signed them, is that correct?

A. That is correct.

Mr. Biggs: Yes.

The Court: All right.

Q. (By Mr. Biggs): Prior to 1954 were any of the—did you ever see—oh, no. Excuse me. Were you ever shown the actual tax notices on that property—U. S. Plywood or Siuslaw Forest Products, did they receive the tax notices or were they sent to Mr. Seaver?

A. They were sent to Mr. Seaver and he brought them with him when he——

Q. Did they ever carry a breakdown on a timber tax?

A. Not to my knowledge; no, sir.

(Testimony of Frank W. McPherson.)

Q. Or personal property?

A. No personal property.

Q. So you computed with Mr. Seaver from time to time what you thought the timber tax might be; is that correct?

A. That's correct. [398]

Q. Did you ever examine the assessment—continuing assessment roll in Lane County to ascertain whether this land was actually carried by the Assessor on the tax roll as timberland?

A. No, sir; I never did.

Mr. Biggs: Yes. We offer in evidence at this time, if the Court please, Exhibit 67, being a photostatic copy of the continuing assessment.

Mr. Dezendorf: Isn't this already in? I thought it was.

The Court: I don't know. Any objection?

Mr. Dezendorf: Well, I would——

The Clerk: It's in.

Mr. Biggs: It's in all right. That's all.

Mr. Dezendorf: That's all.

The Court: That's all. Any further testimony?

Mr. Biggs: Just one minute. I think we may be through, your Honor. Yes.

Your Honor, we have a matter that we hope to be able to cover by stipulation. It will save quite a bit of time. Go ahead. That's fine. Other than that I have no other evidence that I want to put in and I thought if we might take a recess now——

The Court: Well, let's talk about some other things. What about Mr. Fox? Are you going to put him on?

Mr. Biggs: He is available. I don't know that any—what [399] he would testify to would be largely cumulative.

The Court: What is it you want to find out from Mr. Fox, Mr. Dezendorf?

Mr. Dezendorf: Well, there are several things.

The Court: What page?

Mr. Dezendorf: No. 1, on Page 27, that the bulk of the timber on the Seaver tract was taken in 1950 was cut in 1950.

The Court: Is there any—

Mr. Biggs: I think actually, Mr. Dezendorf, our stipulation covers that.

Mr. Dezendorf: Well, that's what I want, is an admission from him.

Mr. Biggs: Call him if you want to ask him that.

Mr. Dezendorf: The Judge was just asking me what I wanted, and I am trying to tell him.

Mr. Biggs: All right.

Mr. Dezendorf: No. 2, I want the increase in stumpage from 1948 on, which appears on Page 35, his testimony with respect to the timber depletion records, which is—

Mr. Biggs: Call him as an adverse witness.

The Court: He is not putting on his case.

Mr. Biggs: All right.

Mr. Dezendorf: It wouldn't take—

The Court: I have read this deposition earlier this [400] morning after I located it, and most of it is totally irrelevant and pertains to documents and how to get ahold of those documents. I thought

it would be a waste of time to ask him the same questions.

Mr. Dezendorf: Well, I think I could do it very—in a reasonably short time by just asking him if he made these statements as admissions.

Mr. Biggs: I think, if the Court please, then, we have no other testimony that we wanted to offer at this time, save for the stipulation with respect to figures. If we can't work that out, why, then, I want to put testimony on as best we can showing precisely what timber came off of certain areas in years. But if we can stipulate on that, we can avoid wasting time.

The Court: All right. You will rest except for the issue of the figures, the amount of——

Mr. Biggs: That's right.

The Court: All right.

Mr. Dezendorf: The Court may remember that they said earlier that Mr. Sanders would be put back. And I reserved my cross-examination until he was put back. But I just wanted to call that to your attention.

The Court: Mr. Sanders, take the stand.

Mr. Biggs: I didn't mean to cut you off on that, Mr. Dezendorf. [401]

Mr. Dezendorf: I might make this suggestion: The figures that we will have to stipulate on will be testified to by Mr. Sanders. We could save time if we could discuss the figures and then we could eliminate the figures on examination.

Mr. Biggs: If we are going to do that, let's forget the stipulation.

Mr. Dezendorf: I said I am sure what you and I wish to do is see if we can agree on the figures because otherwise he will have to testify to them. If we agree on them, he doesn't; and that will shorten the cross-examination.

The Court: Mr. Warlick is here. Will you please take the stand?

Mr. Dezendorf: The Court will recall that last night I said that I was having the questions and the discussions in connection with the ruling transcribed by the Reporter, which I have done. I am inclined to think that there might be some profit in, perhaps, our having a short conference in chambers before I commence, unless your Honor has some different feeling about it.

The Court: No. We haven't got any chambers here. So go right ahead.

Mr. Dezendorf: Well, my point is I don't want to violate whatever your Honor may think to be the proper ruling that was made in connection with the matter. May I have Exhibit 30-B [402] shown to the witness, please?

The Court: Wait a minute. Leave that over here. On what theory are you asking him these questions?

Mr. Dezendorf: On two: Number 1, your Honor overruled us the opportunity yesterday of showing the document to Mr. Warlick, which we believe if it was available yesterday should be available now if it was an offer made in good faith, which I know it was. In the second place——

The Court: Well, I am going to tell you it was

an offer made by me in good faith which you rejected in good faith at that time, too. And I offered it to you three times and asked you if you wanted to use that against this witness and you turned me down in my chambers and you turned me down in the courtroom.

Mr. Dezendorf: Well, I would think that if the offer were valid yesterday that it should be valid today.

The Court: Well, the rule in this court is that except for impeachment you must exhibit all documents to opposing counsel in advance of the trial. You refused to do so. Yesterday noon in my chambers when I gave you the opportunity it implied that Mr. Biggs was going to see that exhibit. You refused to do it at that time. We went out to the courtroom, I gave you that opportunity again, and you refused. Now after you reject it I don't see how you can ask that it be marked because in my view that's a direct violation of the Rules [403] of this Court. But if Mr. Biggs hasn't any objection——

Mr. Biggs: Here is my objection, your Honor: Let me say, in fairness to Counsel, he showed me the contract yesterday. So I have seen the document. My objection to the continued cross-examination goes to the point, first, that if it is not for impeachment purposes and no proper foundation has been laid for that, it's wholly irrelevant anyway. It does not touch upon any matter that would affect this witness' credibility as to impeachment. It's with respect to a collateral mat-

ter and this being a lay witness there is no basis for an impeaching question if that is what the claim is on a collateral matter.

So I adhere to the original objection, your Honor, as an attempt to impeach, if that's what Counsel claims for it, on a collateral matter.

The Court: I don't know. What do you claim for it?

Mr. Dezendorf: I claim this for it: It shows an entirely different treatment of a similar transaction which bears out the testimony of both Mr. Warlick and Mr. Davidson with respect to the first transaction which was different but is the type of transaction that they were describing yesterday which happened just about twelve months later with respect to another transaction.

Now, it also shows—and both men testified—that they read the first contract, they knew what was in it, [404] and yet it didn't contain what they said their intention was, whereas this one does. I think it has relevancy from several standpoints. As a matter of fact, I think it's one of the most important documents in the case. And if I have made a mistake in the handling of this exhibit I certainly don't want the mistake visited on my client. And I am trying to proceed in good faith.

The Court: You have told me that about three times now. But you have worked on the Rules of this Court yourself, haven't you?

Mr. Dezendorf: I have.

The Court: Yes. And I imagine that you have practiced in the Federal Court as much as any

man in the United States District Court for this District and you are very well acquainted with the rule that a sealed document may only be used for impeachment. This cannot be used for—you couldn't use it for substantive evidence.

Mr. Dezendorf: Well, I thought your Honor said yesterday that you gave me the opportunity to use it for that and I wish to accept it.

The Court: You rejected it. You mean after you rejected it twice yesterday, now because you couldn't get it against Mr. Davidson you want to accept the offer that you rejected?

Mr. Dezendorf: Your Honor, I am merely trying to do my best in this case to comply with your Honor's feelings about [405] the matter.

The Court: Oh.

Mr. Dezendorf: And I may say that after reading this testimony which the Reporter has transcribed I still think it was properly admissible yesterday as an impeaching document. But there is no point in our arguing that again, because your Honor feels otherwise. All I am trying to do——

The Court: Give me the authority upon which you rely. Tell me one case that says it's admissible as an impeaching document.

Mr. Dezendorf: I think that one question would permit it to be put in, the question on Line 24, Page 1:

“Q. Did you sell the merchantable timber on that property to Mr. Davidson?

“A. I haven't read the contract since, probably, the month after I sold it. But it's my understand-

ing—my memory is that I sold the merchantable timber—all the timber on the place.”

Now, I think that in and of itself is sufficient to permit that document go in as an impeaching document.

Mr. Biggs: Well, if the Court please, that’s entirely consistent with that his testimony is here. It’s exactly what——

The Court: I want to tell you something. I have thought [406] it over, and in spite of the fact that I don’t appreciate your failure to accept the offer that I made to you yesterday I am going to let it in and you can proceed with this witness.

Mr. Dezendorf: Thank you, your Honor. May I have the document handed to the witness? By the way, I forgot to say one other thing which might be relevant from the standpoint of the record, if I may, at this time, your Honor. The document concerned is one which has been recorded and is, of course, of public record. [407]

MARVIN T. WARLICK

produced as a witness in behalf of the Defendant, having been previously sworn, was examined and testified as follows:

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Warlick, you have in your hand Exhibit 30-B. A. Right.

Q. Does your signature appear upon it?

A. It does.

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: I will offer it in evidence.

Mr. Biggs: Only the original objection that I had, your Honor. I don't care about the Rules, particularly. It's irrelevant. It doesn't tend to impeach the witness. It's not inconsistent with what he previously said. It relates to an entirely different transaction. Otherwise——

The Court: Yes. But it's not being offered for impeachment any more. Is that right?

Mr. Dezendorf: I am trying to get it in under your Honor's ruling that it can be used only for substantive evidence and that, perhaps, you have given me another chance.

Mr. Biggs: Well, as substantive evidence, your Honor, it's clearly objectionable. It relates entirely to a different transaction. It doesn't prove or disprove any issue in this case to the agreement that the parties had on the tract in dispute. It isn't drawn by the same lawyer. Different parties [408] entirely. This is Mr. Davidson, who said he was dealing for himself and took the contract to his own lawyer to——

The Court: Well, I don't think it's relevant, but I am going to let it in because I have been letting in a lot of information that I don't think is relevant. But it is admitted.

(At this point a photostatic copy of a three-page document, previously marked for Identification as Plaintiff's Exhibit 30-B, was received in evidence.)

The Court: All right. That's all, Mr. Warlick.

(Testimony of Marvin T. Warlick.)

Redirect Examination

By Mr. Biggs:

Q. Do you know who drew that contract yourself, Mr. Warlick?

A. My memory was that it was Mr. Calkins. S. M. Calkins.

Q. That was Mr. Davidson's attorney? Or do you know?

A. Oh, I think Mr. Davidson—my memory is that Mr. Davidson said, "Have you got an attorney that we could get to draw this?" And I said, "Well, he does all my work and I think he would be glad to do it for you."

Q. Did he take it down there, or do you know?

A. I don't know. [409]

Recross-Examination

By Mr. Dezendorf:

Q. Well, Mr. Warlick, you notice on the outside of that it said "Return to Mr. Davidson," did you not? See at the bottom under the stamp mark there.

A. You mean when it was recorded?

Mr. Dezendorf: May I approach the witness and show him? May I have it a second?

The Court: Yes.

Q. (By Mr. Dezendorf): I am directing your attention to the bottom here on the document, on

(Testimony of Marvin T. Warlick.)

the back, where it says "A. S. Davidson." Do you see that?

A. Well, sir, I think that's what I would do if I was Mr. Davidson. I would—if I took it to the Clerk's office, I'd expect them to return it to me after it was recorded.

Q. You didn't pay Mr. Calkins?

A. I wouldn't know now.

Q. You know that you didn't, don't you?

A. No, I don't.

Q. You have no memory of it at all?

A. Of paying for this contract?

Q. That's right. A. Absolutely none.

Q. If you had paid it, you would probably remember it, wouldn't you? [410]

A. No, I would not because I have had lots of dealings fifteen years ago, and I—I don't remember a grocery deal when I pay it.

Q. Did you go in and tell Mr. Calkins what the transaction was?

A. I don't remember. I doubt if I did.

Mr. Dezendorf: That's all.

Mr. Biggs: That's all.

The Court: All right. That's all. You have asked Mr. Davidson to remain. Do you want Mr. Davidson?

Mr. Dezendorf: No.

The Court: All right. Now, Mr. Sanders, you can come forward.

(Witness excused.)

Mr. Dezendorf: I wonder if we could have a minute to see if we can agree on these figures?

The Court: We will take a ten-minute recess.

(Recess taken.)

Mr. Biggs: Could we have two minutes more, your Honor?

(At this point there was a discussion between Mr. Biggs and Mr. Dezendorf.)

Mr. Biggs: It is stipulated by and between the parties that the total volume of timber removed from the Seaver tract [411] after 1950, after the logging season of 1950 was 4,536,000 feet, of which 850,000 was old-growth, 3,239——

The Court: He doesn't want to agree.

Mr. Dezendorf: Just a minute. I am just——

Mr. Biggs: Yes — 239,000 was second-growth. Do you want us to read this so you can hear it, your Honor?

Mr. Dezendorf: I want to know first what you are saying.

Mr. Biggs: All right. 3,239,000, second-growth; 439,000, hemlock. It is stipulated also that those— yes. That's the total, isn't it? That those figures may be taken for the purpose of reckoning the application of any limitations period applying to timber taken off after 1953. Defendant, however, does not stipulate that there was no logging activity on the Seaver tract in 1951 or '52.

Mr. Dezendorf: And we don't concede——

Mr. Biggs: And you don't concede——

Mr. Dezendorf: That there was, according to your——

Mr. Biggs: That insofar as logging activity has any bearing on the issue of abandonment or relinquishment, the defendant contends that there was logging activity; plaintiff denies that there was logging activity. That would be an issue. But the Court need not consider that in considering——

Mr. Dezendorf: If the Court please——

Mr. Biggs: ——after January 1, 1953.

Mr. Dezendorf: ——we were both working under a little [412] bit too much pressure. If I might make this suggestion, we can leave this last thing to do. I think we can accomplish it. If we can't, the only additional man that would have to come back would be their cruiser, Mr. Sanders.

Mr. Biggs: All right.

Mr. Dezendorf: We are going a little too fast, I am afraid.

Mr. Biggs: If the Reporter will prepare a copy at his convenience of the stipulation—just dictate it for Mr. Dezendorf and one for me—then I think we can——

Mr. Dezendorf: I think we can resolve it. And that will——

Mr. Biggs: That will save a lot of time.

The Court: Do you want Mr. Sanders now?

Mr. Biggs: I have no further testimony at this time, if the Court please.

Mr. Dezendorf: We are ready for Mr. Sanders, then, with that understanding. [413]

PAUL SANDERS

produced as a witness in behalf of the Defendant, having been previously sworn, was examined and testified as follows:

The Court: You have already been sworn.

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Sanders, you were the cruiser that was to work with Mr. Jones, our cruiser, in making a joint cruise of the Seaver property, were you not?

A. That is correct.

Q. My memory is that you had some kind of an accident just about the time you were to start. Can you refresh my memory on that?

Mr. Biggs: Had some what, Mr. Dezendorf? I didn't get the question.

Mr. Dezendorf: Had an accident?

Mr. Biggs: Accident?

Mr. Dezendorf: Yes.

Mr. Biggs: Regards what? Will you ask the Reporter to read the whole question? I'm sorry; I just couldn't get it.

The Court: He said he remembers that this witness had an accident just before he was to start with Mr. Jones to make this joint cruise.

Mr. Biggs: Oh. [414]

The Witness: No. I had no accident that I can recall before we started the cruise.

Mr. Dezendorf: Well, isn't it a fact that some-

(Testimony of Paul Sanders.)

one working for you started out on the cruise and then when you recovered you took over and went on?

A. No, that's not the fact.

Q. You don't remember hurting your leg either fishing or something else?

A. I sprained my knee in the process of the cruise, which is a normal occurrence, but it occurred within—during the cruise.

Q. I see. A. But not before.

Q. Then you were off for some time?

A. Not for that reason, however.

Q. For some other reason? A. Yes.

Q. What was the other reason?

A. The cruise—as I said yesterday, the cruise was made under my personal direction and under my responsibility and that I was actually a part of the cruising party for part of the cruising job.

Q. I see.

A. That I was not personally a part of our cruising party during the whole job. [415]

Q. All right. I guess we are all together.

A. That was not for the reason that I sprained my knee.

Mr. Dezendorf: I see. Well, subject to whatever we may have to have if we don't agree on the figures that's all I have now.

Mr. Biggs: I have nothing.

The Court: That's all, Mr. Sanders.

(Witness excused.)

The Court: All right. Rebuttal.

Mr. Hoffman: We would like to call Mr. [416] Buss.

FRED BUSS

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Hoffman:

Q. Mr. Buss, where do you live?

A. Well, I live about three miles east of Canary.

Q. Where is Canary with relation to Florence?

A. Well, it's about ten miles southeast of Florence.

Q. Have you lived there most of your life?

A. Yes, I have, all my life.

Q. Born up in that country? A. Yes.

Q. Where is that with relation to the property we have been referring to as the Seaver property?

A. Well, it would be, oh, roughly, I'd say, about 15 miles west and a little—probably a little south.

Q. All right. Have you ever been on the property we call the Seaver property?

A. Yes; I built road through it.

Q. Do you recall when you were first there?

A. Oh, that's going way back.

Q. You helped build the first road into it?

A. Well, yes; that you could travel with a car.

Let's see—— [417]

Q. All right. A. ——'23, I think.

(Testimony of Fred Buss.)

Q. All right. Now, what have you done during most of your adult life as an occupation?

A. Well, I was raised as a farmer and went from the farm to logging.

Q. When did you start to log? A. What?

Q. When did you start your logging?

A. Oh, I worked for Vaughn & Bester in 1918, I think.

Q. Have you logged ever since?

A. Well, yes, off and on.

Q. Have you ever bought timber? A. Yes.

Q. Have you logged and bought timber in this general area we are talking about?

A. Yes; around Canary.

Q. Have you ever sold and delivered logs into the Mapleton area?

A. Yeah; we delivered some logs to Forest Products.

Q. Siuslaw Forest Products?

A. That's right.

Q. When was it you first delivered logs to the Siuslaw Forest Products? Just your best recollection. A. Oh, I think about '45 or '46. [418]

Q. All right. Now, do you recall what kind of a log it was?

A. Yeah; it was old-growth or what they called a bastard growth. It was just ripened old-growth.

The Court: What?

The Witness: Just ripened old-growth. It was a bastard—what the foresters call a bastard growth.

(Testimony of Fred Buss.)

Q. (By Mr. Hoffman): Was there a time when you did log second-growth timber in that area?

A. Yes. Oh. I looked up the records and about the earlies that I had any records of, I think, was about '46.

Q. And that would be the first time that you as a logger in the area dealt in second-growth logs; is that right? A. That's right.

Q. Whom did you sell to?

A. Well, we sold to Forest Products and we sold to the LaDuke Lumber Company.

Q. Do you remember how much you got for the logs delivered?

A. Well, this will be an estimate. I think it was about \$18.00.

Q. Prior to that time what kind of a log had you been dealing with?

A. Well, old-growth and bastard growth and cedar.

Q. Did a change occur in the logging area—that is, the logging practices in that area as to what you could log? [419]

Mr. Biggs: If the Court please, I object to any further questions along this line.

The Witness: You will have to speak louder. I can't hear you.

Mr. Biggs: I am speaking to the Judge. In any event, Mr. Buss, I don't mind you hearing me. On the theory that the only pertinency at all, apparently, would be to go to the issue of merchantability. This isn't rebuttal. The plaintiff made its

(Testimony of Fred Buss.)

showing with respect to merchantability on its case in chief.

Our proof was to meet the plaintiff's showing. Certainly they can't come back with another line of testimony, another line of witnesses, to reopen their case in chief for the purpose of——

The Court: Was there testimony that Siuslaw Forest Products bought from Mr. Buss?

Mr. Biggs: No. No, there isn't any testimony on that point at all.

The Court: What is the purpose of this showing?

Mr. Hoffman: This first showing, your Honor, is to demonstrate that there was no dealings in second-growth logs in that area prior to '46 and '47. They maintained that there was and this is evidence to rebut that, to this point.

The Court: Well, I venture to say you could bring in 10,000 people who didn't deal in second-growth logs. But it [420] doesn't make any difference if they can show that they had five people who dealt with it before that time.

Mr. Hoffman: My point, your Honor, is this, to show that there was a change in the area as to what could be utilized. And I——

Mr. Biggs: That's a part of their case in chief, your Honor. They were met with the requirement of showing as a part of their case in chief what timber was merchantable and what was not merchantable according to their definition, according to their theory. They put a witness on, and one

(Testimony of Fred Buss.)

witness on only, which presented their case as to merchantability of second-growth timber.

The Court: Well, how many more witnesses of this kind have you got?

Mr. Hoffman: This is the last one, your Honor.

The Court: All right. I am going to let you open up your case in chief for this purpose.

Mr. Hoffman: All right. We will ask as to merchantability.

Mr. Biggs: As to all other witnesses they want to show on this?

The Court: This is the only witness they are going to use.

Mr. Biggs: I see.

The Court: So I let them open their case in chief for [421] the purpose of putting on this witness.

Mr. Hoffman: Thank you.

Would you read the last question, Mr. Reporter?

(At this point Mr. Hoffman's last question to the witness was read by the Court Reporter.)

Q. (By Mr. Hoffman): Did you understand that, Mr. Buss?

A. What was it, again?

Q. I will rephrase the question. The question is, did there occur a change in that area over these various years as to what you could log, what you could utilize?

A. That's right.

Q. What was that change?

(Testimony of Fred Buss.)

A. Well, when we started logging second-growth we just didn't log it.

Q. Why not?

A. Well, there was no profit in it.

Q. Could you get rid of it?

A. Oh, you could give it away.

Q. Now, from your experience as a logger and buying and selling timber in this area over all these years and—let me ask you this further question: Were you familiar with the timber on the Seaver property in May of 1942 prior to this contract of Mr. Warlick's?

A. Well, I'd been through it a lot of [422] times.

Q. All right. Now, based on your experience as a logger and your knowledge of this particular timber, and based on the economic factors involved, do you have an opinion as to whether or not that second-growth timber on the Seaver land was merchantable in May of 1942?

Mr. Biggs: I object, if the Court please——

The Witness: I am.

Mr. Hoffman: Hold it.

Mr. Biggs: ——to the question insofar as it calls for this witness' opinion, based upon merchantability which I think the cases hold must reflect the intention of the parties under all of the circumstances.

The Court: What do you regard as merchantability?

The Witness: Timber that you can log and get into the mill and make a little profit off from.

(Testimony of Fred Buss.)

The Court: Yes. Well, the objection is sustained.

Mr. Dezendorf: Could we ask for the answer to the question under the Court's ruling. We would like to make an offer.

The Court: You want to set out the definition of merchantability and ask him whether that timber is merchantable under that theory?

Mr. Dezendorf: Using the same one that we used at the outset.

The Court: Yes.

Mr. Hoffman: If the Court will indulge me, we will find [423] that.

Q. Now, Mr. Buss, I want to ask you this and listen, please. Will you please accept this definition I am going to read to you as the definition of merchantable timber in this case? Then you can give us your opinion. Merchantable timber is that timber on a particular date which I will mention which has a commercial value, taking into account its size, quality, its location, accessibility, demand and market conditions. Now, using that as your definition of merchantable timber, do you have an opinion as to whether or not this second-growth timber on the Seaver property on May, 1942, was merchantable?

Mr. Biggs: I object, if the Court please. He previously stated, your Honor, that that is not a proper test of——

The Court: I note your objection. Go ahead. Answer the question.

(Testimony of Fred Buss.)

Q. (By Mr. Hoffman): Do you have an opinion?
A. I have.

Q. What is your opinion?

A. Wasn't merchantable.

Q. Was not merchantable?

A. Not under them conditions.

Mr. Hoffman: That's all. You may [424] examine.

Cross-Examination

By Mr. Biggs:

Q. You say that second-growth on the Seaver tract was not merchantable under the definition that was given to you?
A. I did.

Q. Was that correct? If it were sold on that date, you would still say it was not merchantable; is that correct?
A. Yes; I'd have to.

Q. You would have to say it even though people who owned it sold it for money to people who bought it and paid the money? You'd still say that it wasn't merchantable, is that correct?

A. For that one strip of timber alone it wouldn't be merchantable. It would be impossible to get it out.

Q. Would it be with another tract?

A. Oh. If you had enough of it, it might.

Q. Yes. If you had several thousand acres of timberland up there adjoining it containing several million—maybe forty million feet in the immediate area, would it then be merchantable?

A. Well, may I make a statement.

(Testimony of Fred Buss.)

The Court: Yes. Go right ahead.

The Witness: That road over there was absolutely impossible to haul logs over and to build a road in there to haul logs over would cost into millions of dollars. That's [425] why I say it's not merchantable.

Q. (By Mr. Biggs): How many dollars?

A. I don't know. I didn't build the road.

Q. No. What did you say, millions of dollars, or many dollars?

A. It would cost a lot of money.

Q. A lot of money. You wouldn't know how much it cost and, of course, you wouldn't know how to allocate it against all the value of the timber, would you?

A. Well, I know there wasn't enough to build it. It wouldn't even build the road, let alone anything else.

Q. You are talking about one tract?

A. That one tract wouldn't, no.

Q. If you had millions of feet in that area, then, you are not prepared to say it wouldn't justify the construction of a road in the area, are you?

A. If you had enough other timber, it might.

Q. How much other timber would you need?

A. I don't know. I never built the road.

Q. You haven't any idea about that?

A. I don't know.

Q. You are not an expert in logging accounting, are you?

(Testimony of Fred Buss.)

A. Yes, I am in logging but not road building.

Q. But not road building. In any event, your thinking about it is that nothing is merchantable that is not profitable; is [426] that correct?

A. That's the way I would put it, yes.

Mr. Biggs: That's all.

Mr. Hoffman: That's all. Thank you very much. You may step down.

(Witness excused.)

Mr. Dezendorf: Call Mr. Jones. [427]

HERBERT R. JONES

previously produced as a witness in behalf of Plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Jones, in connection with the joint cruise that you made of the Seaver property, did you examine the property with a view of determining whether the second-growth or other timber there was suitable for poles or piling? A. Yes.

Q. What can you tell us about that?

A. Well, that isn't the type of second-growth timber that's used for piling at all.

Q. Why not? What is the matter with it?

A. Well, it's not the long, slim, close-grained type of timber that used for piling. It just isn't piling, the same shape or form that piling is.

(Testimony of Herbert R. Jones.)

Q. Was this fast-growing second-growth?

A. Very fast.

Q. And what does that do with respect to the development of rings in it?

A. The rings are quite aways apart.

Q. Is that why it's not suitable for piling, among other things?

A. That's one of the reasons. [428]

Q. And did you find that there was any stand or stumps on the property which indicated that there was second-growth on there suitable for poles or pilings?

A. Well, there might have been a few.

Q. But it would be a relatively small amount?

A. That's right.

Q. Now, was the second-growth timber on this land comparable to the second-growth timber on the land that you bought in Coos Bay?

A. It was very similar.

Q. Were the ages about the same?

A. Pretty close. The timber I bought was probably a little bit younger.

Q. How old, generally, was the second-growth fir on the Seaver property in 1942?

A. Well, it was from 50 to 70 years old when it was logged in 1950, so it would be between 40 and 60 years old in 1940.

Q. That's relatively young second-growth, is it not? A. Yes.

Mr. Biggs: That's rather leading, if the Court please.

(Testimony of Herbert R. Jones.)

The Court: Well, that's all right. Go ahead.

Q. (By Mr. Dezendorf): Was it at that age comparable with what you had on your property at Coos Bay? A. Yes.

Q. Were you able to market your second-growth on your Coos [429] Bay property when you bought it? A. No; not for a year or two.

Q. When were you able to first sell it to a mill?

A. I think it was in 1949. Might have been late '48.

Q. Did you actively try to sell it before that time?

Mr. Biggs: If the Court please, this is wholly irrelevant, what one man's experience was in the operation.

The Court: In the Coos Bay area.

Mr. Biggs: And I object to any further questions.

The Court: Go ahead.

Q. (By Mr. Dezendorf): Before you were able to sell it? A. Yes.

Q. There was some testimony yesterday about some second-growth—I guess it's Hills Creek Lumber Company. Are you familiar with the second-growth stand that they were working in?

A. I am.

Q. What connection, if any, do you have with that operation?

A. Well, at the present time I do their engineering for them.

Q. Is the second-growth that was available to

(Testimony of Herbert R. Jones.)

them comparable to the second-growth that was on the Seaver property in 1942?

A. No, it isn't.

Q. What is the difference?

A. Well, there is a tremendous difference in the second-growth. [430]

Mr. Biggs: Just one moment, if the Court please. It's entirely a different and new line of expert testimony, when Counsel opened his case and has rested his case on the theory that second-growth timber was not merchantable timber per se in 1942. This is an attempt now, apparently, to show that some second-growth may be and some may not be. It is opening up entirely new standards as a part of their case in chief which will require us to come back on surrebuttal and meet what dimensional evidence or new standards they are asking the Court now to apply. It's a departure from——

The Court: I don't see why these questions were not propounded to this witness on your case in chief.

Mr. Dezendorf: Because Mr. Graham was called by them as a witness. We are trying to rebut their testimony. We can't anticipate they are going to call Mr. Graham. We are trying to now show what Mr. Graham was talking about isn't comparable to Seaver land.

The Court: He was talking about second-growth timber.

Mr. Biggs: You said all second-growth was non-merchantable in 19——

(Testimony of Herbert R. Jones.)

Mr. Dezendorf: I don't accept your statement of that.

Mr. Biggs: Well, then, what was it, Mr. Dezendorf? I have wanted to know from—all during pre-trial proceedings precisely what your position was with respect to the types or kind of second-growth that you said was not merchantable and [431] you have always said that none of the second-growth timber was merchantable.

Mr. Dezendorf: On the Seaver tract. I am not concerned about anything else.

Mr. Biggs: When you put Mr. Jones on in your case in chief it was to the effect that no second-growth timber was merchantable in 1942.

Mr. Dezendorf: I disagree with you. His inquiry was directed to the Seaver property and nothing else. We are merely trying to meet what their witness testified about.

Mr. Biggs: You didn't limit it to 40-, 60-year growth, Mr. Dezendorf.

Mr. Dezendorf: I don't see any point in arguing with him about it. Let's get a ruling.

The Court: Well, I might say that if Mr. Biggs was misled I certainly was, because that is what I thought your position was throughout this case. This is for the first time that I am advised that you make any distinction between second-growth on this tract and second-growth generally.

Mr. Dezendorf: Why, there is all kinds of second-growth, your Honor.

(Testimony of Herbert R. Jones.)

The Court: Well, why didn't you say so in your opening statement and your——

Mr. Dezendorf: I am sure that I have limited everything that I have said to the merchantability of the second-growth [432] timber on the Seaver property.

The Court: Well, you can bring in all the evidence you want and you can have a delay in order to meet this evidence. This is the only witness of this kind I am going to permit. Have you got any other witnesses?

Mr. Dezendorf: Just Mr. Seaver.

The Court: Mr. Seaver. All right.

Mr. Dezendorf: Which is to meet the point on the Swenson operation.

The Court: All right.

Mr. Dezendorf: Would you read the question, please?

(At this point Mr. Dezendorf's last question to the witness and the witness' answer thereto were read by the Court Reporter.)

Q. (By Mr. Dezendorf): Complete your answer.

A. Well, the second-growth that grows in the Coastal area is an entirely different type of second-growth timber that grows in this Eugene area. And the Hills Creek Lumber Company, they logged in the Hills Creek vicinity, which is very close to Eugene, which is not the type of second-growth that grows on the Seaver property. It's a closer

(Testimony of Herbert R. Jones.)

grain, slower growing, and it's much more valuable a type of timber than the Coast second-growth.

Q. As a matter of fact, the Hills Creek second-growth was even east of Eugene, was it not? [433]

A. Yes.

Mr. Husband: If the Court please, now, if I remember Mr. Graham's testimony—and I may have missed some of it—my recollection was that he was talking about the problem of second-growth in general. He was not talking about second-growth of the Hills Creek Lumber Company. And I don't remember any testimony in his testimony about second-growth that they were dealing in at that time or were operating in at that time in 1938 when he went there. He was talking about the whole problem of second-growth timber in this vicinity in Lane County. I remember he said there were three or four mills in Lane County that were operating exclusively on second-growth.

The Court: All right.

Mr. Dezendorf: You may cross-examine.

Cross-Examination

By Mr. Biggs:

Q. What are the specifications for piling that you say make second-growth suitable, Mr. Jones?

A. Well, it's very varied in diameter. There are small piling and long—what they call fish strap piling. There is a tremendous variation.

Q. What is the variation? Give us the outer—

(Testimony of Herbert R. Jones.)

A. The ring count is usually around seven rings to the inch. [434]

Q. Well, what does that mean in diameter? Could you transpose that in diameter?

A. Well, the diameter of that piling, the maximum usually was around 18 inches or 14 to 18 inches.

Q. The maximum. What is the minimum?

A. Well, I would say about 8 to 9 inches. They go by top diameters usually.

Q. What is the length?

A. From 20 feet to one hundred and—whatever you can get. 150.

Q. All right. What other specifications?

A. It has to be straight.

Q. All right. Anything else?

A. I can't think of any.

Q. All right. Do you mean now to tell the Court that there was no substantial amount of second-growth on the Seaver tract between 8 as a minimum and 18 as a maximum inches in diameter, over 20 feet high, that were straight? Are you telling the Court that?

A. I am saying that there wasn't any timber on the Seaver property that would be—make good piling.

Q. Well, I have asked you to define what the specifications are for piling and you have said just what I have quoted to you. Now, do you mean to say that there was no substantial amount of second-growth on the Seaver tract that would [435]

(Testimony of Herbert R. Jones.)

meet the specifications that you yourself have laid down?

A. Mostly on account of the ring count, not because it wasn't straight and wasn't 20 feet long.

Q. What does the ring count have to do with it?

A. That was just one of the specifications for piling.

Q. Yes. Tell us why it is important whether it has six or seven or nine or ten?

A. Because it has a much better lasting quality. When piling is driven in salt water and after it is creosoted it doesn't make any difference. But when it's uncreosoted piling, why, it makes a lot of difference when you get——

Q. Do they creosote most or not? Is there a market for uncreosoted piling?

A. Yes.

Q. I mean for creosoted piling?

A. There is a market for both.

Q. There is a market for both. So that it doesn't make any difference as to the ring count in 1942 if you treated it with creosote?

A. Well, in 1942 they weren't treating it so much with creosote as they are now.

Q. Were they doing it at all?

A. I don't know exactly. Of course they were doing some.

Q. Doing a lot of it up in Washington, weren't they?

A. Well, I wasn't up in Washington in 1942 so I don't know. [436]

(Testimony of Herbert R. Jones.)

Q. Well, you weren't around here either, really, in 1942, were you?

A. Yes; I was here until October, 1942.

Q. Until October, 1942? A. Yes.

Q. You were here ten months. And you had been here, then, only a year, I believe you said?

A. That's right.

Q. Yes. So, you really don't know what they were doing down in this area, do you? I say "area." I am talking about Lane County.

A. Yes, I know what they were doing.

Q. Well, weren't they selling any piling? Was there a market for piling? A. Well, sure.

Q. Produced in this area down here that would require creosoting, if you know? If you don't know, say so. A. I presume there was.

Q. There was. Well, then, wherein was the second-growth on the Seaver tract not merchantable or suitable for piling by your definition, Mr. Jones?

A. I don't quite get that. I don't quite get your question.

Q. You don't? A. No.

Q. I have attempted in complete fairness to you to take every [437] standard or specification that you have mentioned as a measure for determining the suitability of timber for piling. I thought you had given it to me. You gave me the dimension 8 to 18 inches. You gave me the height, 20 to 150 feet. You said that it was straight and you said that it should be not under a seven-ring count; is that correct? A. That's approximately correct.

(Testimony of Herbert R. Jones.)

Q. Which I assume means so many rings to the inch on a stump, is that right?

A. That's right.

Q. Now, you have just said that you didn't think most of that on the Seaver tract would meet the ring-count specifications; is that right?

A. That's right.

Q. But you said that wouldn't make any difference if you creosoted the log; is that correct?

A. It makes a difference, but it don't—

Q. Well—

Mr. Dezendorf: Let him finish. He has been interrupting his answers there.

Mr. Biggs: All right.

The Witness: It makes a tremendous difference, but since they have started to creosote—before—I should say before they started to creosote piling, why, they wouldn't touch a large—a piling that had three rings to the inch, for [438] instance.

Q. (By Mr. Biggs): But I thought you said they were creosoting in 1942?

A. I said I didn't know for sure, but I presumed they were.

Q. Oh. Well, that's what I thought you said. If they were, then, the creosoting would overcome the defect in the second-growth log so far as the ring count is concerned, is that correct?

A. Well, to a certain extent. It was a question of supply and demand. If there was a sufficient piling that had a close ring count, they wouldn't fool with piling that had three rings to the inch.

(Testimony of Herbert R. Jones.)

Q. As far as marketability is concerned, it's always a question of supply and demand, even on old-growth, isn't it? A. Yes.

Q. Yes. So that we are talking now about specifications, meaning the usability of a log for particular purposes. Do you mean with those definitions in mind and considering that the second-growth on the Seaver tract that was under seven rings to an inch could have been creosoted, do you mean to say that the second-growth on that tract wasn't within the specifications you have laid down for piling?

A. Yes, that's what I mean to say.

Q. Why?

A. That that wasn't the second—that wasn't piling type [439] timber.

Q. Well, then, tell me why. Wherein wasn't it within the specifications you have said?

A. Well, in the first place it wasn't straight, most of it.

Q. Wasn't straight? A. No.

Q. Well, how straight does a tree have to be?

A. You have to be able to drive it.

Q. Yes. You would say the second-growth on the Seaver tract wasn't straight enough to drive, couldn't produce poles straight enough to drive?

A. Well, I wouldn't say all of it couldn't.

Q. Well, how much of it?

Mr. Dezendorf: Just a minute. There he goes again interrupting every answer that this witness attempts to make on cross-examination. And I object.

(Testimony of Herbert R. Jones.)

The Court: All right. Go ahead.

Mr. Biggs: Finish your answer.

The Witness: It's just not the piling type. It tapered too fast and it was too—wasn't a straight tree. It had lots of limbs on it and it was more of a scrub-type tree than the type that's used for piling.

Q. (By Mr. Biggs): And how much of it was that way?

A. Well, I don't know exactly how much. All I saw was the stumps and the surrounding trees. [440]

Q. Well, then, how can you speak about what the trees were like if you saw only the stumps?

A. Well, I saw the surrounding—what we judge the timber to be on the Seaver place was by what was still left there, what was left on the surrounding areas.

Q. In other words, what was left on the surrounding areas didn't look to you like the kind of logs that you would like to have for pilings, but you didn't see and couldn't visualize from the stumps what the trees were like on the Seaver place, is that correct?

A. That's correct. We couldn't tell except from the ring count of the stumps and adjoining timber.

Q. Were there any other uses being made of second growth other than piling, planks?

A. Ties.

Q. Ties? A. Uh-huh.

Q. Yes. A. Yes.

Q. Bridge decking?

A. I suppose some bridge decking.

(Testimony of Herbert R. Jones.)

Q. Studding? A. Yes, studding.

Q. You don't mean to say the second-growth on the Seaver place wasn't suitable for those [441] things? A. I didn't say that.

Mr. Biggs: I didn't think you did. I wanted to be sure you didn't. That's all.

Mr. Dezendorf: That's all, Mr. Jones.

The Court: Let me ask you, was it suitable for these other purposes?

The Witness: Second-growth?

The Court: Yes; on the Seaver place.

The Witness: Yes.

The Court: So, the only point that you were bringing out, that it wasn't suitable for piling?

The Witness: That's right.

The Court: All right. That's all right. That's all.

Mr. Dezendorf: Now that the Court has asked that——

Redirect Examination

By Mr. Dezendorf:

Q. How would you have gotten the second-growth out of there in May of 1942, Mr. Jones, if you were going to try to use it for piling or ties?

The Court: You don't have to go into that. The same way they would take the old-growth out, by building a road. Okeh.

Mr. Dezendorf: Just a minute.

Q. Wasn't the ring count of ties important, too?

A. Very important. [442]

(Testimony of Herbert R. Jones.)

Q. Would all of the second-growth on the Seaver property meet the specifications for ties?

A. Well, it would meet the specifications for a certain kind of tie.

Q. Was it the low-grade or the high-grade or what? A. Low-grade tie.

Q. Low-grade? A. Yes.

Q. How many grades were there?

A. Well, I am not an expert on ties, but I understood there was about three grades.

Mr. Dezendorf: That's all.

Mr. Biggs: That's all.

The Court: That's all.

(Witness excused.)

Mr. Dezendorf: We would like to then call Mr. Fox for the purpose of——

The Court: All right. Mr. Fox, will you take the stand, please? [443]

PERRY GRANT FOX

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Fox, what were your duties for Siuslaw during the time the logging was progressing on the Seaver property from '49 through '55?

A. Well, I was there to—primarily as an engineer—logging engineer.

(Testimony of Perry Grant Fox.)

Q. So that up until sometime in 1954 you didn't have any direct supervision or control over the logging activities on the Seaver property, is that correct?

A. Well, when you are talking about logging activities what do you include?

Q. Severing trees.

A. Yeah. I didn't have anything to do with that, no.

Q. All right. Now, I understand from Mr. McPherson that you became the logging superintendent sometime in 1954; is that correct?

A. Yes; I would say that is right.

Q. Did you continue on as the logging superintendent from sometime '54 until all of the activity stopped on the Seaver property?

A. Yes. [444]

Q. And during the period that you were logging superintendent from sometime in '54 until the end of 1950 were you familiar with what was going on on the Seaver property with regard to the severance of trees?

A. I was familiar, yes.

Q. I don't believe you filed any of the timber removal affidavits, did you?

A. I would have to check. I am sure I didn't, though.

Q. You are sure you did?

A. I did not.

Q. Did you procure any of the forest harvesting permits for the operations on the Seaver property?

A. Well, that would—I would probably have to look at the applications.

(Testimony of Perry Grant Fox.)

Mr. Dezendorf: Mr. Biggs, may I see that folder that I haven't had a chance yet to look at?

Mr. Biggs: Yes.

Mr. Dezendorf: Do you wish to have these marked as sub-numbers, Mr. Biggs. This is from 76. Will you mark that -A, then, please?

(At this point a permit was marked for Identification as Plaintiff's Exhibit 76-A.)

Q. (By Mr. Dezendorf): Showing you Exhibit 76-A, did you have anything to do with the procuring of that permit? [445] A. Yes, I——

Q. Or is that the application for the permit? What is it? That's the permit, isn't it?

A. This is the permit itself.

Q. Yes. That refers to certain cut-over land that you got a permit to cut on again in the Seaver tract, does it not, in 1954?

A. It's land on the Seaver tract.

Mr. Biggs: I think it speaks for itself.

Q. (By Mr. Dezendorf): Doesn't it say "cut-over land" there in the box?

A. No; I don't see any.

Q. Do you see a little black box in the middle of the page? A. Oh, yes.

Q. What does it say in there?

A. It says "Siuslaw cut-over strips or blocks."

Q. Did you have something to do with applying for that permit? A. Yes, I applied for it.

Q. And I assume that you applied for the other permits, then, during the time that you were the logging superintendent, is that correct?

(Testimony of Perry Grant Fox.)

A. I would say, yes.

Q. And you knew what was being taken from the property? A. Yes. [446]

Q. It was treated just as if you owned the property in fee, was it not, when it was logged?

A. Yes.

Q. Had you seen the May 4, 1942, contract among the records of the company at your office?

A. Yes, I have.

Q. And, as a matter of fact, this large map which, I believe, is Exhibit 20.

The Clerk: Two of them, -A and -B.

Q. (By Mr. Dezendorf): 20-A and -B were on the wall in the Manager's office in the Siuslaw office at Mapleton, were they not?

A. No; they wasn't in the Manager's office.

Q. Where were they?

A. They were in the office that I used.

Q. What office was that, the logging superintendent's office?

A. Well, it was my office. I don't know whether they call it the logging superintendent's office or Fox's office, or whose it is.

Q. It was the office that you occupied?

A. That's right.

Q. On those maps are shown the estimated quantities of timber which appear on the timber estimate and depletion records that we have talked about, too, isn't that correct?

A. I would say, yes. [447]

Q. Now, just to take you very quickly over the point that I am interested in that you testified in

(Testimony of Perry Grant Fox.)

your deposition—I think we can do it quicker this way.

The Court: Well, do it the correct way. Just ask him the questions. If he doesn't give you the answers that you like, you impeach him.

Mr. Dezendorf: Very well. Or, may I not do it as admissions, also, your Honor?

The Court: Well, see what he says first.

Q. (By Mr. Dezendorf): As I understand it, Mr. Fox, the bulk of the timber was taken off the Seaver property in the year 1950.

A. I don't know—I don't get what you mean when you say "bulk."

Q. All right. Page 27.

A. I would say the large majority was—of it was taken off.

Q. You mean the largest portion of the timber was taken in 1950, is that right?

Mr. Biggs: If the Court please, we have stipulated, Mr. Dezendorf and I, as to the volumes. And the purpose of it was to arrive at some figure that would not leave the Court or the record in confusion as to what different witnesses might have estimated. That is a matter of record. I see no relevancy to this. [448]

The Court: All right. It doesn't make any difference.

Q. (By Mr. Dezendorf): Now, I understand that there was a tremendous increase in the price of stumpage from 1948 on; is that correct?

A. On until the present time.

(Testimony of Perry Grant Fox.)

Q. Well, let's say from '48 to '54.

A. Well, there is an increase, yes.

Q. Well, there was a very heavy increase, was there not?

Mr. Biggs: If the Court please, I don't like to keep interrupting. We have stipulated to values also by years.

The Court: That doesn't make any difference.

Mr. Biggs: At Counsel's request.

Q. (By Mr. Dezendorf): Mr. Fox, did you make these answers to these questions on your deposition? Page 35.

Should the original be before him, or may I interrogate from my copy?

The Court: Go ahead and read.

Q. (By Mr. Dezendorf): Line 15:

"Q. Well, from your own experience and background can you state whether or not the value of that stumpage has increased from 1948 up to the present time?

"A. Yes, it has increased in price considerably. That's for sure."

Did you make that statement? [449]

A. Yes, I did.

Q. Was it true? A. Yes.

The Court: That's not the question you originally asked him to impeach. You said there was a tremendous increase of that before.

Mr. Dezendorf: Well, he said, "It has increased in price considerably. That's for sure."

The Court: Yes.

(Testimony of Perry Grant Fox.)

Mr. Biggs: Your Honor, my objection is this: I think it's improper to call a witness solely for the purpose of impeaching him.

Mr. Dezendorf: I am not——

Mr. Biggs: Now, substantive matters, everything you have talked about, were covered by stipulation and were put into the record to avoid any question about these issues. The rest of it is solely for the purpose of impeaching and it's improper.

The Court: Well, I think he has a right to get this information——

Mr. Biggs: Information——

The Court: ——from him, and then if he is caught by surprise he may use the deposition.

Mr. Biggs: Yes; except we have stipulated as to volumes and values, and that's all he has talked about.

The Court: Go ahead. [450]

Q. (By Mr. Dezendorf): Now, was there a record kept of the log recovery by tracts as the Seaver property was logged?

A. I think I said in my deposition that I thought that the office manager kept a book of what logs came in from each tract as our description of the tracts go.

Q. Is that the fact?

A. I don't know. I wasn't able to find out whether he did or not.

Q. Did you try?

A. I called him, yes.

Q. So far as you know, then, as of this moment

(Testimony of Perry Grant Fox.)

you don't know of any record that would show the volume of timber taken from the Seaver property by tracts as it was logged? A. That's right.

Q. Were there any little maps kept annually to show the quantity of timber removed from each piece of property that you cut?

A. Well, of course, our depletion records were kept.

Q. I am not talking about depletion records; I am talking about maps. A. No.

Q. At the time your deposition was taken you thought there were?

A. At the time my deposition was taken I said that there was maps that we used in our depletion records and I am not [451] sure whether you are talking about at the time that we were on the Seaver property or what I was doing now.

Q. May I refer you to Page 105 of your deposition, commencing at Line 12? I will ask you if this question was asked you and if you gave these answers:

“Q. Now, in connection with your accounting, whether it's at the end of the year or not, do you furnish certain maps showing timber areas and timber cut and that sort of thing?

“A. At the end of the year, sure, we show what has been cut.

“Q. On a map? A. On a map.

“Q. What kind of a map do you use?

“A. Well, it varies. Anything to make a pic-

(Testimony of Perry Grant Fox.)

ture, you might say, or show where the cutting is.”
Did you give that testimony?

A. Yes. And that was after this—that was after the depletion records was kept. That’s exactly the way that I did that after I was in charge of the records.

Q. At the time you gave your testimony you thought that was the case also during the time the Seaver property was cut, did you not?

A. Well, I think I didn’t know at that time because I——

Q. All right. Now, you referred to a possible sale of the [452] timber to Cascade Plywood Company in 1954. A. Yes.

Q. Who with Cascade Plywood Company were you dealing on your level?

A. Well, I wasn’t dealing with anybody.

Q. Well, did they come down there and look at your timber depletion records?

A. Well, yes. There was——

Q. All right. Who came down? That’s what I’m trying to find out.

A. I think probably Mr. Robert Conklin was the first man that came in.

Q. Was there someone else there with him?

A. Well, there is men there from time to time. I don’t know——

Q. And that was in 1954, was it not?

A. Yes.

Q. Isn’t it a fact that you told Mr. Conklin that

(Testimony of Perry Grant Fox.)

all of the timber had been removed from the Seaver tract by the spring of 1954?

A. I didn't tell Mr. Conklin anything.

Q. Did you give him records that showed that it had all been removed before 1954?

A. I couldn't say whether I did or whether I didn't. I don't know. [453]

Q. Well, did you talk to him? Were you the man that dealt with him?

A. No; I didn't deal with him; I told you that.

Q. Who did?

A. I told you I didn't make any dealings.

Q. Well, who was the one that Mr. Conklin was talking to? A. I do not know.

Q. You were there, but you don't know?

A. It wasn't under my—I didn't have authority to make any deals.

Q. You tell us that you haven't any idea who Mr. Conklin was talking to at your office in Mapleton, is that right?

A. Well, a man would naturally assume he would be talking to the Manager.

Q. Who was the Manager in 1954?

A. Ralph DeMoisee.

Q. When did Mr. DeMoisee come?

A. Well, I'd say he was there in '54.

Q. Yes. But he came later in the year '54, didn't he, and this transaction was in the spring of '54, wasn't it?

A. Oh, I don't know when the—I would have to think. That's been awhile. Since you mention it, I

(Testimony of Perry Grant Fox.)

think that Frank McPherson was the Manager when Mr. Conklin came in.

Q. Do you think they were the two that were talking about what timber there was to be sold, if any? [454]

A. Well, I don't know whether that would be so or not. But you would have to talk to them about that.

Mr. Dezendorf: That's all.

Mr. Biggs: That's all.

The Court: That's all. Call your next witness.

The Witness: What shall I do with this?

Mr. Dezendorf: That goes in here (indicating). Thank you. Call Mr. Seaver.

Mr. Biggs: May I ask him one question on the permit?

Cross-Examination

By Mr. Biggs:

Q. Does that include more than the Seaver tract? A. Yes. Others.

Q. Other areas? A. Yes.

Mr. Dezendorf: I think it will speak for itself.

The Court: Are you offering it?

Mr. Dezendorf: That's the exhibit that we still haven't had a chance to look at.

The Court: You don't want to offer it?

Mr. Dezendorf: No. We still haven't had an opportunity, your Honor. You have kept us so busy. And the exhibits are here when we are gone so we haven't had a chance to look at those to compare. [455]

JOHN N. SEAVER, JR.

produced as a witness in behalf of the Plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Seaver, were you in the courtroom yesterday when a witness was telling about the Swenson mill, I believe it is? Is that the correct word?

A. Yes; it was mentioned yesterday.

Q. Where is the Swenson mill and where was it in the period from 1942 on?

A. In 1942 it was at Swisshome, is where his mill was there.

Q. It's always been there?

A. Well, the one in that area, yes.

Q. Right. Do you know of your own knowledge what kind of logs that Swenson mill was cutting in the period 1942 and immediately thereafter?

A. I don't know. After that I went in the Service.

Q. All right. But I am just trying to gear you now to '42 to '45. Do you know what kind of logs that mill was cutting in that period?

Mr. Biggs: He said he didn't—

The Witness: I could say from '42.

Mr. Dezendorf: All right.

Q. Tell me for '42. [456]

A. Mainly old-growth timber.

Q. Now, did you or your family purchase any

(Testimony of John N. Seaver, Jr.)

cut-over land which had been logged by the Swensen Company on or prior to 1942?

A. Just about that time, about 1942, we bought property from them.

Q. How much did you buy?

A. I think, one piece, 160 acres adjoining property already owned.

Q. Was that in the vicinity of the Swensen mill at Sweet Home? A. Swisshome.

Q. Swisshome?

A. Within a mile; yes, sir.

Q. Was it right on a road? A. Yes.

Q. What timber remained on that property at the time you bought it in 1942?

A. Well, by stand? Now, there was lots of timber.

Q. Was it old-growth or second-growth that was there when you bought it in 1942?

A. Mainly second-growth. But there was still a lot of old-growth.

Q. Had any appreciable quantity of the second-growth been logged from the land prior to the time you bought it in 1942 [457] by the Swensens?

A. No.

Mr. Dezendorf: You may cross-examine.

Mr. Biggs: No cross-examination. Just a minute.

Mr. Dezendorf: One question. I wonder whether the Court would like some explanation of those pictures. They are here and they have been received. Mr. Seaver is the only one that we know that can give a little short description of each picture. If

(Testimony of John N. Seaver, Jr.)

you think that would be helpful—I think it would be for the record.

The Court: Let me take a look at the pictures.

Mr. Dezendorf: It's pretty hard to tell where they were taken from unless there is a little explanation that goes with them. I think it might be wise to have him briefly do that.

The Court: There is no legend on them?

Mr. Dezendorf: No, there is not. But he can just give a one-sentence description with respect to each one.

The Court: All right. Go ahead.

Mr. Dezendorf: May I hand them to him one by one?

The Court: Yes.

Mr. Dezendorf: I'll see if they're in order.

The Court: Yes.

Q. (By Mr. Dezendorf): Mr. Seaver, I am handing you what has been marked as 12-A. Will you tell us briefly what that picture shows and whether it was on your land? We will get a [458] little better as we go along. But try to be as brief as you can.

A. Well, this looks like my land, yes. There is not much in this picture to orient me as to exactly where it was.

Q. You were there when these pictures were taken?

The Court: What is it supposed to show?

The Witness: The land as it looks right now.

(Testimony of John N. Seaver, Jr.)

The Court: Oh. That's what it is?

The Witness: Last month.

The Court: All right.

Q. (By Mr. Dezendorf): Now, showing you 12-B, what does that show?

A. Well, I am in this picture. I was standing on some old-growth stumps. And it looks like I might be a couple hundred feet off the gravel road. The car is shown there, too.

Q. What is the point of the picture?

A. I am way up here. Well, it shows I am up inside the timber that's standing there and the timber is cut up in there. And there is timber between me and the road that wasn't cut.

Q. Handing you -C, what is the purpose of that picture? What does it show?

A. Oh, I am measuring a typical stump along—right close to the road there. I don't think we picked out anything particular.

Q. What was the measurement of the stump?

A. Well, I can't read my tape in the picture, but it looks [459] like about 18 inches.

Q. All right. Showing you 12-D, what does it purport to show?

A. This is a picture that was taken prior to the first one where I was a small spot in the picture. I was over on the edge of this hill over here (indicating).

Q. The hill in the center? You had better say where or it won't mean anything.

(Testimony of John N. Seaver, Jr.)

A. The one in the center just down the road a little bit.

Q. Showing you 12-E, what does it show?

A. This is a side canyon off of the main road. It's a picture taken right up through the bottom of the canyon. It shows the hills on each side and it shows the cut-over ground.

Q. Is the property where the trees are still standing your property?

A. Yes. I think everything in that picture is still my property. I am sure it is.

Q. So, it shows what was cut and what was left, is that right? A. Yes.

Q. Showing you now 12-F, what does it show? Tell us whether the timber that appears in the immediate foreground is on your land or on adjoining land, or what?

A. The picture is taken from my land looking northeast to adjoining land. This is a timber stand right against my [460] property as it is right now.

Q. But the timber that is shown there is not your land but on land owned by Siuslaw or U. S. Plywood?

A. That's Forest Service property, that particular piece.

Q. I see. Was the timber on your property typical of that before it was logged? A. Yes.

Q. Showing you now 12-G, what does it show?

A. It's another typical hillside, taking a picture of the bottom ground and looking up the hillside. It

(Testimony of John N. Seaver, Jr.)

shows what is still standing, I guess, and what has been cut there.

Q. Showing you 12-H, what is the purpose of that picture?

A. This is about a half a mile farther up the road.

Q. Which direction, now?

A. This road (indicating) is going southwest that we are on here. I am about—the road isn't shown, but I recognize the picture of it. It's about 50 feet off the road again and just measuring a stump. Looks like it's about a 12-inch stump. And it shows the——

Q. Now, 12-I, where were you on the property and what does that show?

A. I am about 500 feet from the previous picture.

Q. In which direction?

A. Going north—or southwest, I believe. Generally southwest, and the road bank is shown here. And this shows timber [461] that is standing there. This is the edge of the road bank right here (indicating).

Q. Now, showing you, I guess it is, -J, where is that and what are those trees? Tell us what it shows.

A. This is taken at a different angle. Same picture as that one (indicating) but only back this way. This picture is taken here looking back this way (indicating).

(Testimony of John N. Seaver, Jr.)

Q. What are the size of those trees still standing at the side of the road?

A. I think that one there was 20 inches or two feet.

Q. Are those second-growth fir?

A. I call them second-growth.

Q. Now, I am showing you a more or less panoramic picture, 12-K, and will you tell us the position from which this was taken and whether the standing block of trees in the center are on your land?

A. This picture was taken prior to the last two we looked at—or before those last two. It was taken first in sequence going up this road (indicating). This is definitely on my land. We are looking southwest.

Q. Is that stand of timber in the middle on your land?

A. Yes. This is the same road only——

Q. All the timber that appears in the picture is on your land?

A. No. In the background are Forest Service timber. [462]

Q. The foreground, however, is yours?

A. Yes.

Q. Showing you now 12-L, what does that show?

A. Well, this shows one of my fields, typical bottom of the valley looking up the hillside. It shows the hill and the cut area and whatever remains on it.

Q. All right. Showing you, now, 12-M, what does that show and where was it taken from?

(Testimony of John N. Seaver, Jr.)

A. Well, right out in front—this is taken pretty close to the main road and right out in front it shows some large stumps and it shows a lot of small standing timber in the back here (indicating).

Q. Everything that appears there is on your land?

A. I can't say positive. I don't tie it to a landmark right here in this particular picture. But I know these pictures were taken on my land.

Q. All right. Looking at 12-N, what does it show?

A. Well, this shows part of my property and part of U. S. Plywood's property. This is where our two properties join in the northeast corner.

Q. Which side of the picture is your property and which side of the picture shows U. S. Plywood's timber?

A. The left-hand side is mine, and the right-hand side is U. S. Plywood's.

Q. Now, that's as you look at the picture, is that correct? [463]

A. Yes. You are looking west in the picture.

Q. However, if you looked at the picture itself to the top it would reverse the directions, would it not?

A. Looking down from the top?

Q. In other words, let me have that and I will show you my point. I have my hand now on the right-hand side of the picture. Is that U. S. Plywood or your timber?

A. That's my property there.

Q. I have my hand now on the left-hand side of the picture. Which timber does it show?

(Testimony of John N. Seaver, Jr.)

A. That's U. S. Plywood's property over there.

Q. I am showing you now Exhibit 12-O. What does that show?

A. Well, it shows a typical old-growth stump right alongside the road right in the bottom.

Q. Can you tell the size of that from the ruler that's on top of it?

A. Well, just—this yardstick was too short to measure it.

Q. It's more than three-foot across at the place of the cut; right?

A. Considerably more than three-foot. It looks like——

Mr. Dezendorf: All right. You may cross-examine.

Cross-Examination

By Mr. Biggs:

Q. Well, the purpose of these pictures is to show you left [464] too much timber out there, Mr. Seaver?

Mr. Dezendorf: Well, I think——

Q. (By Mr. Biggs): Is that your contention, that this timber should have been taken or shouldn't have been taken?

Mr. Dezendorf: Just a moment. I would object to the question unless we get one question. We have got three now, and I don't know which one the witness——

Mr. Biggs: I want to know what the purpose of the pictures is.

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: I think that's argumentative.

Mr. Biggs: I don't know what they purport to show.

The Witness: They show my property.

Q. (By Mr. Biggs): Show your property? Do you contend that the trees that were left there should have been removed?

A. I think my attorney——

Q. You don't know?

A. ——briefed me on the facts of what the law should be in regard to the thing. I don't know.

Q. You don't know. Well, is it your contention that it wasn't well logged? I am just trying to get the purpose of the pictures.

A. I don't know what he wants here.

Q. Are they in for any other purpose?

Mr. Dezendorf: They are to show what the property looked like a month ago. [465]

Mr. Biggs: So I don't care anything about that, then.

The Court: All right. Any questions?

Mr. Biggs: No questions.

The Court: That's all.

Mr. Dezendorf: That's all. As far as we know, we have nothing more; although it's about five minutes to 12.00. I wonder if we could adjourn and try to work out this stipulation as soon as the Reporter can transcribe it?

The Court: What about all these witnesses? Are they all excused with the exception of Mr. Sanders?

(At this point the following stipulation was read into the record out of the Judge's presence:)

STIPULATION

Mr. Dezendorf: It is stipulated between the parties for the purposes of this action that between January 1, 1953, and December 30th, 1955, excluding any timber removed from the property by the plaintiff, Seaver, the following quantities were removed: Old-growth, 850,000; second-growth, 3,100—3,125,000; hemlock, 431,000; cedar, 8,000, for a total of 4,414,000 board feet. The defendant by so stipulating does not waive its contention and its testimony that logging activity occurred upon the Seaver property in 1951 and 1952. By the same token, the plaintiff does not waive its contention or testimony that there was no logging on the Seaver property after logging operations ceased in 1950 until 1953.

Does that do it?

Mr. Biggs: I think that's all right. [469]

Afternoon Session

(Court reconvened at 1:15 p.m., on May 16, 1958, pursuant to the noon recess, and further proceedings were had herein as follows:)

Mr. Dezendorf: With respect to Defendant's 76, I plotted out the descriptions and find that the ones numbered 4278 and 6447 do not relate to the Seaver property. The rest of them do in part relate to the Seaver property. I will have no objection to all of

76 going in. I claim nothing for the little marks I made on them. They were just for my reference in checking through them.

The Court: Any objection?

Mr. Biggs: No; no objection, your Honor.

The Court: Admitted.

(At this point Defendant's Exhibit 76, a Manila folder containing eight documents entitled "Forest Operation and Conservation Harvesting Permit," was received in evidence.)

Mr. Biggs: We would offer, if the Court please, our Exhibit 65, which consists of checks that were written to John Seaver with letters.

The Court: Is that the one that Mr. Dezendorf wanted the stubs on? [470]

Mr. Biggs: Yes.

The Court: Have you seen the stubs?

Mr. Dezendorf: They haven't produced them yet.

Mr. Biggs: I am sorry. I overlooked it. They are coming up from the office now.

The Court: I will take it under advisement.

Mr. Dezendorf: We can work that out later. There will be no problem on it.

Mr. Biggs: Now, the only thing of any consequence, your Honor, are the field notes and maps, and so on. The field notes of the cruiser relating to comparable areas which they looked over prepared in the event there were any issue as to dimensional sizes. None has been created, so I think we won't offer those.

large chart which we haven't made [473] reference to. And I think if there is a little explanation to it it may mean more. This chart was made from an aerial survey dated July 8th and 9th, 1953. Mr. Hoffman, you on our side can point out the piles of logs there are there.

Mr. Hoffman: Mr. Seaver can. The Seaver property is outlined in magenta. Mr. Seaver, would you step to the map?

Should they be marked?

The Court: Oh, I don't think so. I don't think so.

Mr. Hoffman: They are hard to locate.

Mr. Seaver: Do you want these marked or just pointed to?

Mr. Hoffman: I might explain. The map and the aerial photo are made by the same company and they are exactly correlated as to size.

Mr. Biggs: I have no objection to the map going in. If there were some particular features you wanted to point out, perhaps we could stipulate to them. We admit there was cold-decking—logging in 1952 where the logs were cold-decked. So there probably were some piles of logs.

(At this point a discussion was held off the record.)

Mr. Biggs: What point is it you want to make, Mr. Dezendorf?

Mr. Dezendorf: I just wanted him to point out the cold-decked logs there. [474]

Mr. Biggs: He says he is able to do it.

Mr. Dezendorf: It won't mean anything to the record.

(Discussion held off record.)

Mr. Dezendorf: May I ask, Mr. Seaver, could you point out on the map the first cold deck that you see of logs?

The Witness: We just as well start on the road. Well, I thought they wanted to see it?

The Court: Why don't you just mark the cold decks with a red pencil? Have you got a red pencil? How about a green pencil here?

Mr. Hoffman: I have a red pencil, your Honor.

Mr. Dezendorf: You don't need to testify. Just mark them with a red pencil, the cold decks. You are making a red circle?

The Witness: Circle around these. I may miss some of them. I am trying to look at them in a hurry here.

The Court: I don't think that's going to make a great deal of difference. I think it might be helpful if we would take about an hour out and maybe Mr. Dezendorf would now tell us in a half-hour what he claims the evidence shows in support of the contentions that he has made.

Mr. Dezendorf: I would be pleased to.

The Court: Go ahead.

The Witness: I believe I have circled most of them.

(At this point Mr. Dezendorf [475] presented his argument to the Court.)

COURT'S OPINION

The Court: I don't think there will be any useful purpose served in my hearing additional arguments. I will first take up the question of abandonment.

I have read Heppner vs. Hughes at least a half-dozen times, and, according to the Court's opinion, in 1939 the defendant's predecessor deeded land reserving all pine and merchantable timber, together with the right to log the same at its convenience. Beginning in 1939 the defendant commenced to log, and as each section was logged, in order to remove the timber from the tax rolls and relieve the company of its obligation to pay taxes, a number of timber removal affidavits were filed with the Assessor.

Four of these affidavits were filed by Mr. Mahoney who was the attorney for the company and also a Director and a Secretary of the company, and one by the General Manager and Vice-President, who testified that he was through the property a number of times between 1939 and 1951. And one was filed by the forester of the company. This last affidavit was executed after "the defendant had admittedly examined the property."

Now, the Court stated, "At the conclusion of the logging operations in 1948, defendant pulled up stakes and, like the Arabs, folded its tents and silently stole away. Shortly thereafter plaintiffs fenced most of the lands and [476] installed a gate which was kept padlocked."

Various officers of the defendant admitted to other people, including interested buyers, that there were no logs on the Hughes' tract and that they had logged it all. The defendant did not claim any timber from the time it left the premises in 1948 until 1951.

That case is in sharp conflict with the facts of the present case. Here the affidavits were filed by Mr. McPherson, an agent who is neither an officer nor a Director. It is true that he had managerial functions and position, but, unlike Mr. Mahoney and the General Manager, he was neither an officer nor a Director. And he testified that he did not examine the tracts but made the affidavits solely from the cutting records.

I was impressed with Mr. McPherson's testimony. I think that he testified frankly, admitting things which were damaging to him without any hesitancy at all. I thought he was a particularly good witness.

The evidence also showed that in spite of these affidavits that the defendant continued to pay taxes on the entire tract after the affidavits had been executed; perhaps, not on the entire tract but on their allocable share of the taxes and they had paid taxes even after the cutting affidavits had been filed.

This is considerably different than in [477] *Heppner vs. Hughes*. Here, logging continued on the Seaver tract after 1950 with the knowledge of the plaintiff. Plaintiff acknowledged in a written contract the ownership of the stumpage in the de-

fendant. And it was the plaintiff who actually logged a part of that timber.

Even if I were of the opinion that the defendants in this case followed a practice which is all too common among timber owners in Oregon, I am still of the opinion that the other evidence in the case which clearly shows no abandonment would prevent me from finding abandonment solely on the basis of the affidavits.

I want to make it clear that I don't condone the filing of false affidavits any more than the Supreme Court of Oregon. But apparently everybody in the State except the Supreme Court of Oregon knows that these affidavits are being filed by various lumber operators. But I do not read *Hughes vs. Heppner* to require a finding of abandonment, even where a false affidavit has been filed in the face of clear and convincing evidence to the contrary. And, therefore, I am going to hold that in this case there was no abandonment in 1950.

Let us now consider the contract between the parties. Even if the decisions to the effect that a grant of merchantable timber is a grant only of the merchantable timber on the land as of the date of the contract, in my opinion [478] plaintiff is not entitled to prevail. In my view plaintiff proposes to place a strained, untenable and unrealistic construction on the terms "all of the merchantable old-growth and second-growth fir and hemlock," whether that portion of the sentence and those terms are considered alone or whether they are considered with the balance of the sentence, which

reads "either standing or down and now growing or located" on the property.

In other words, plaintiff's contention that in the year 1952 in the Mapleton area no second-growth merchantable timber existed flies in the face of the evidence and is contrary to the express intent of the parties as evidenced by the agreement itself. This is true even assuming his present statement that while there may have been merchantable timber on other tracts, particularly on the Coast, no such timber existed in this particular area.

If no second-growth timber is merchantable, why in the world would the parties have inserted a statement in the contract that they were selling second-growth timber? This is not a case of two people who didn't know the business. On one side we had Mr. Davidson representing the company, and on the other side Mr. Warlick. I don't think that either of them, particularly Mr. Davidson, would have put in a useless phrase "merchantable second-growth" if there wasn't any merchantable second-growth. [479]

The mere fact that in one year, or even in several years, second-growth could not be converted into timber profitably does not render the timber unmerchantable. If that were the case, during a depression one would have to hold that the best stands of old-growth timber which were on excellent terrain, either right next to a mill or on the road, were unmerchantable because the timber could not be sold at a profit.

This concept is not confined only to the lumber business. Both you men who represent railroads know that that is a very common thing. Lines are operated year after year at a loss because a greater loss would be suffered if the operations were discontinued. And many mills operate at no profit or little profit or at a loss in order to keep their facilities going. It is something more than making interest; it is keeping your organization together.

In addition, I believe that when the words "the grant" are construed in the light of the standard laid down in the case of *Parsons vs. Boggie*, 139 Ore. 469, and as approved in *Hughes vs. Heppner*, it is obvious that there was merchantable timber in 1942 as well as at all times thereafter. That portion of the opinion was quoted in *Hughes vs. Heppner* on Page 15, and it says, "The Court must, as far as possible, construe the instrument from the words used as showing what the parties had in mind at the time of its execution. The respondent sold and the appellant bought with [480] the understanding that the timber was to be removed. We must also take into consideration the circumstances surrounding the parties at the time the sale was made," and the following statement is underlined, "also, their attitude toward the subject matter subsequent to the execution of the contract." Mr. Warlick and Mr. Davidson are not in disagreement as to what was intended; neither is Mr. Gonyea, the three people who were witnesses to that transaction. According to Mr. Warlick, he told the Tucker brothers that he had sold all the timber. And, while

we don't have the benefit of the testimony of Mr. Tucker or either of the Tuckers, we have the testimony of the plaintiff himself that the Tuckers told him that they had sold all the timber and that he was only getting the land.

The plaintiff never claimed that second-growth was not merchantable until November, 1956. And that was about six months after he had filed this particular lawsuit. And, while the complaint is merely a notice pleading, I have read plaintiff's deposition, and if I know anything about Manley Strayer, the questions would have been much more precise had this claim been made. But it is obvious that plaintiff was claiming that the five-year period was the thing upon which he was hanging his hat; in other words, once the company entered the tract for the purpose of removing timber, it had only five years to remove the timber. [481]

Mention has been made of the fact of the \$7,000 price paid by the Siuslaw Forest Products Company originally. According to the Revenue Stamps, the plaintiff in this case bought this tract of land for very little money; I think it was \$4,000 or \$6,000.

Mr. Biggs: He said between three and four, or thirty-seven fifty.

The Court: And if plaintiff was to obtain any money or damages by reason of acts prior to the time he acquired it, plaintiff got such claim for free. He didn't pay anything for it.

But I don't think you can decide lawsuits on that basis. Timber was selling for a lot less then.

I imagine that Weyerhaeuser Timber Company today is cutting timber that cost it 25 cents a thousand. And I believe many other companies are doing the same thing.

Whether we construe the contract by its wording alone or whether we construe it in the light of the position of the parties, I can't see that any interpretation is valid other than that the buyer was to get all of the timber.

I was very much surprised at Mr. Gonyea's testimony that there was a discussion about the cedar. Maybe there was, but there was quite a bit of disagreement as to what happened about the cedar. I don't think that we can attribute malice and evil intent to the company for cutting down five cedar [482] trees in a tract of 400 acres. But, in view of the fact that it was admitted at the commencement of this case that defendant is liable for the cedar, it wasn't much of an admission, for it only involved \$40—I find that the company is liable for this cedar. I am going to allow a judgment against them for that amount doubled. I am not going to allow treble damages even though it's a very trivial amount, because I don't think that there was any wilfulness in the action of the company.

Now, is there anything else that you want me to cover, either of you, or make findings on? I am willing to make findings on anything, either for or against you.

Mr. Biggs: It's very clear, so far as we are concerned. You cover the points quite well.

The Court: All right. Well, you present findings——

Mr. Biggs: Very well.

The Court: ——to the plaintiff and I will give you ten days within which to—well, I won't enter the findings for a period of ten days after they have been presented to me and after they have been served upon Counsel. I think all the exhibits have been admitted into evidence. Those that have not been admitted may be made a part of the record if either party desires so the Court of Appeals will have the opportunity to right a wrong if a wrong has been committed.

Mr. Dezendorf: All of ours have been [483] identified.

Mr. Biggs: Ours have all been identified, your Honor, and we are not going to make any further presentation of exhibits. We think that covers the point.

The Court: All right. We will adjourn this court. This court will be recessed sine die.

(At this point the Court adjourned and proceedings in this matter were con- [484] cluded.)

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Jack Ellis, an Official Reporter of the above-entitled Court, do hereby certify that I reported

in stenotype at Eugene, Oregon, on May 14th, 15th and 16th, 1958, the proceedings had in the above-entitled matter; that I thereafter caused my said stenotype notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 484, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so reported by me in stenotype on said dates, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 26th day of December, 1958.

/s/ JACK ELLIS,
Official Reporter.

[Endorsed]: Filed January 2, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for removal; Answer; Amended complaint; Answer to amended complaint; Pretrial order; Findings of fact and conclusions of law tendered by defend-

ant (not filed); Letter dated June 17, 1958, with attached pages 9, 12 and 13 of tendered findings of fact and conclusions of law; Letter dated July 15, 1958, with attached pages 6, 8, 9 and 10 of tendered findings of fact and conclusions of law; Plaintiff's objections to the findings of fact, conclusions of law and judgment tendered by defendant; Plaintiff's objection to conclusion of law VI and to the proposed judgment order declaring defendant to be the prevailing party, etc.; Findings of fact and conclusions of law; Judgment order; Notice of appeal; Bond for costs on appeal; Order extending time to docket appeal; Stipulation and order to transmit exhibits to Court of Appeals; Stipulation designating portions of record to be contained in record on appeal; Appellee's designation of additional portions of record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8695, in which John N. Seaver, Jr., is the plaintiff and appellant and United States Plywood Corporation is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith three copies of orders from the Court of Appeals extending time to docket appeal. And under separate cover we are forwarding the reporter's tran-

script of proceedings in two volumes. All exhibits are being shipped by auto freight.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 5th day of February, 1959.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 16357. United States Court of Appeals for the Ninth Circuit. John N. Seaver, Jr., Appellant, vs. United States Plywood Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed and Docketed: February 6, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16357

JOHN N. SEAVER, JR.,

Plaintiff-Appellant,

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Defendant-Respondent.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

On this appeal, plaintiff-appellant will rely on the following points:

(1) Trial court erred (a) in granting plaintiff-appellant a judgment for only \$80.00; (b) in failing to find and conclude that subsequent to January 1, 1953, defendant-respondent and its predecessor intentionally trespassed upon the land involved and wilfully cut and removed therefrom over 4,414,000 feet of old growth and second-growth fir, hemlock and cedar trees and timber which were not merchantable on May 4, 1942, or which had been abandoned by them and in which they had relinquished all interest, and (c) in failing to award plaintiff-appellant a judgment for three times the value of the timber so removed.

(2) Under the May 4, 1942, contract, defendant-respondent and its predecessor were entitled to remove only the old growth and second-growth fir and hemlock timber which was merchantable on May 4, 1942, and not that which may have become merchantable thereafter.

(3) The words "merchantable timber" contained in the May 4, 1942, contract are unambiguous, and it has never been the law in Oregon that "merchantable timber" is that timber which has commercial value during the life or term of the contract so that the trial court erred in receiving evidence to interpret the contract.

KOERNER, YOUNG,
McCOLLOCH &
DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 10, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto that all the exhibits offered and received during the trial and all exhibits offered but not received during the trial need not be printed in connection with the appeal to the United States Court of Appeals for the Ninth Circuit.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Appellant.

/s/ HUGH I. BIGGS,
Of Attorneys for Appellee.

[Endorsed]: Filed February 16, 1959.

